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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

WALTER KOTKO,

Defendant and Appellant.

C079944

(Super. Ct. No. 07F07698)

Following a jury trial, defendant Walter Kotko was convicted of two counts of sexual intercourse with a child under the age of 10 (Pen. Code, § 288.7, subd. (a)), three counts of oral copulation or sexual penetration of a child under the age of 10 (Pen. Code, § 288.7, subd. (b)), and 13 counts of lewd and lascivious acts upon a child under the age of 14 (Pen. Code, § 288, subd. (a)). The jury found true allegations that defendant committed the offenses against more than one victim (Pen. Code, § 667.61), and the trial court sentenced defendant to an indeterminate term of 290 years to life in prison.

On appeal, defendant contends: (1) the prosecutor committed prejudicial misconduct by denigrating defense counsel and misstating the law during closing argument, (2) the trial court erroneously instructed the jury with former CALCRIM No. 1191 (“Evidence of Uncharged Sex Offense”)¹, (3) the trial court erroneously instructed the jury with CALCRIM No. 375 (“Evidence of Uncharged Offenses to Prove Intent, Motive, Knowledge”), (4) the trial court erroneously admitted evidence of an uncharged incident involving defendant’s now deceased daughter pursuant to Evidence Code section 1108² and erroneously instructed the jury with CALCRIM No. 1191, (5) the trial court erroneously instructed the jury with CALCRIM No. 332 (“Expert Witness Testimony”) and CALCRIM No. 360 (“Statements to an Expert”), (5) the trial court erroneously instructed the jury with CALCRIM No. 302 (“Evaluating Conflicting Evidence”), (6) the trial court improperly excluded evidence of other sexual conduct by one of the victims, and (7) the cumulative effect of all of the asserted errors requires reversal. Finding no reversible error, we affirm.

I. BACKGROUND

A. The Prosecution’s Evidence

The prosecution presented evidence that defendant sexually abused two girls: B.T. and T.C. During the trial, the prosecution also presented evidence that B.T. and T.C. did not know one another and had no connection other than as victims of defendant.

¹ “In March 2017, CALCRIM No. 1191 was modified to distinguish uncharged offenses offered as propensity evidence and charged offenses offered for that purpose. CALCRIM No. 1191A now applies to the former, while CALCRIM No. 1191B applies to the latter.” (*People v. Gonzales* (2017) 16 Cal.App.5th 494, 496, fn. 1 (*Gonzales*).) All references to CALCRIM No. 1191 are to former CALCRIM No. 1191.

² Undesignated statutory references are to the Evidence Code.

1. Sexual Abuse of B.T. (Counts 14-18)

B.T. met defendant in 1994. At the time, she was nine years old.³ Defendant, then 45, lived a couple of houses down from B.T. with his daughter, S.K., and S.K.'s five-year-old son, A.G. B.T. and A.G. became close friends and B.T. began spending more and more time at defendant's house. During the trial, B.T. was described as "slow." The record indicates that B.T. is legally blind and has an IQ in the mentally deficient range.

Defendant began sexually abusing B.T. when she was nine and a half years old. During the trial, B.T. recalled that she was watching a movie with A.G. when defendant summoned her to a bedroom and invited her to sit on the bed. Defendant rubbed B.T.'s vagina over her clothes, and then allowed her to return to the movie. B.T. did not say anything to A.G., but she was "uncomfortable and distraught." Defendant touched B.T.'s vagina over her clothes several more times. Over time, defendant gradually escalated to touching B.T.'s vagina under her clothes and inserting his finger into her vagina. Defendant also directed B.T. to stroke his penis and orally copulate him. Defendant instructed B.T. not to tell anyone, warning they could both get in trouble, and B.T. would not be allowed to see A.G. anymore.

The abuse escalated further when B.T. turned 11 and defendant began penetrating her with his penis. During the trial, B.T. estimated that defendant achieved complete vaginal penetration on 34 occasions. As the abuse escalated, so too did defendant's threats. Specifically, defendant threatened that he would hurt B.T. and her parents if she told. Despite these threats, B.T. tried to tell her father what was happening. But B.T.'s father failed to intervene or otherwise protect her.

³ B.T. was 29 at the time of trial.

The abuse came to a temporary halt when B.T. was 12. During the trial, B.T. recalled that defendant penetrated her, causing her to bleed. B.T. waited until defendant was occupied in the bathroom, and then left his house. She ran down the street towards her house, followed by defendant. Upon reaching her home, she encountered her aunt, then age 16. B.T. told her aunt that defendant had put his penis inside of her and showed her blood on her underpants.

B.T.'s aunt did not testify at trial. However, Sheila Davitto, a former school psychologist for Sacramento City Unified School District, testified that she met with B.T. in 1998, and B.T. volunteered that she was being molested by a neighbor. Davitto, a mandatory reporter, notified authorities.

Detective David Ford investigated. Ford testified that B.T. participated in a forensic interview in June 1998, which was videotaped. A copy of the video recording was admitted into evidence, but not played for the jury. In the video, a 12-year old B.T. can be seen describing incidents of sexual abuse at defendant's hands. B.T. can also be heard asserting that defendant touched A.G.'s "private" on one occasion when they were lying in a bed together in the dark. During the trial, Ford testified that he stopped working on the case against defendant in September 1998. The record does not disclose why the investigation was dropped.

On cross-examination, B.T. was impeached with discrepancies or perceived discrepancies between her trial testimony and interview statements. Among other things, B.T. was impeached with discrepancies in her statements regarding the number of incidents of sexual abuse and her age at the time of various incidents. Of greatest significance, B.T. was impeached with her earlier report that defendant had touched A.G.'s "private." On cross-examination, B.T. acknowledged that defendant may have only touched A.G.'s leg when they watched television in the bedroom together.

During the trial, B.T. explained that defendant became more aggressive as she grew older. He was also more threatening. As B.T. put it, "Threats got to the point to

where it was really, really bad where he was threatening my life. He was threatening my parents' life. That nobody was going to believe me if I told." Defendant molested B.T. for the last time when she was 14 years old. Shortly thereafter, B.T. inappropriately touched two young boys and was sent to juvenile hall. Later, she was arrested for selling drugs and sent to county jail.

2. *Sexual Abuse of T.C. (Counts I-XIII)*

T.C., who was 18 years old at the time of trial, met defendant when she was three or four. Her mother, M.C., who testified through an interpreter, worked for defendant, helping to care for his ailing mother. M.C. began a romantic relationship with defendant after his mother died. They married in 2006, when T.C. was nine years old. Prior to marrying defendant, M.C. was undocumented. Following the marriage, defendant helped M.C. apply for a spousal visa so she could stay in the country legally.

T.C.'s relationship with defendant changed when she was seven or eight years old. During the trial, T.C. recalled that she fell from her bicycle and injured her vaginal area. Defendant offered to kiss T.C.'s vagina to make it better. T.C. declined, but defendant persisted, asking numerous times over a period of days. Finally, T.C. acquiesced. Defendant took T.C. to the bedroom, positioned her on the bed, and performed oral sex on her.

A couple weeks later, defendant asked T.C. if he could "do it again." T.C. said no, but once again, defendant persisted. Again, T.C. acquiesced. As before, defendant positioned T.C. on the bed and placed his mouth on her vagina. This time, defendant told T.C. to leave her pants around her ankles so she could pull them up quickly if someone came. Afterwards, defendant cautioned T.C. not to tell anyone. If she did, defendant warned, M.C. would be deported and T.C. and her brother, J.C., would be sent to separate foster homes and would not be able to see one another. T.C. said nothing.

The abuse continued in this manner for some time. Eventually, defendant settled into a routine in which he would tell T.C. that he wanted to "play." T.C. understood

defendant to mean that he wanted to engage in sexual activity. Defendant would then take T.C. to the bedroom and molest her.

Over time, the abuse escalated from oral copulation to digital penetration. By the time T.C. was nine years old, defendant had escalated to sexual intercourse. During the trial, T.C. recalled that defendant attempted or achieved sexual intercourse, “too many [times] to count.” Asked for an estimate, T.C. ventured that defendant placed his penis inside her vagina as often as three times a week. T.C. also recalled that defendant made her touch his penis “at least ten times,” made her orally copulate him more than 20 times, and anally penetrated her between two and five times. Defendant would become angry when T.C. tried to refuse him, and T.C. was afraid of what might happen if she told.

Things continued in this way until Monday, July 30, 2007. That morning, M.C. left for work and defendant took T.C. to the bedroom. He placed his penis in T.C.’s vagina, and then instructed T.C. to orally copulate him. Suddenly, hearing something, defendant leapt from the bed and ran to the window. He looked outside, and then said, “[O]h shit, pull up your pants. Your mom’s here.” Defendant then put on his own pants and ran out of the room.

During the trial, M.C., who worked as a house cleaner, recalled that she went to work on the morning of July 30, 2007, and was told that she did not need to clean that day. She returned home, arriving unexpectedly around 11:30 a.m. When she reached the front door, she discovered that the screen door was locked. This was unusual, as the family generally left the door unlocked. M.C. knocked, and defendant appeared to open the door.

M.C. entered the house and inquired after T.C. Moments later, she found T.C. in the bathroom, crying. When asked why she was crying, T.C. responded that she had stubbed her toe. Skeptical, M.C. asked defendant what was going on. Defendant explained that T.C. was crying because he told her she would not be allowed to go on a school field trip. M.C. did not believe defendant’s explanation either.

M.C. went back to T.C. and pressed for an honest answer. This time, T.C. revealed that defendant had touched her inappropriately. The conversation between M.C. and T.C. took place in Spanish. M.C. then confronted defendant in English. Defendant denied the allegation. M.C., now mad, continued to ask defendant what had happened with T.C. T.C. exhorted defendant to tell the truth, and defendant continued to deny any wrongdoing. M.C. announced that she and T.C. were leaving. Defendant begged them to stay. He said he was sorry and promised not to touch T.C. again. He threatened to kill himself if M.C. and T.C. left. Alarmed, M.C. asked T.C. to call S.K.

During the trial, S.K. recalled that she received a telephone call from defendant on July 30, 2007. Defendant said that he needed to tell S.K. something. In the background, S.K. could hear M.C. yelling, “tell her what you did.” S.K. asked defendant what he had done. Eventually, defendant acknowledged that he had “touched [T.C.] inappropriately.” During the course of the same conversation, defendant also said he had done an “unforgivable thing.” Defendant also said he wanted to kill himself because he could not live with what he had done. During the trial, T.C. and M.C., who were listening to defendant’s end of the conversation, confirmed that defendant admitted to having touched T.C. inappropriately. T.C. also heard defendant say he had done “unforgivable things.” Shortly thereafter, defendant handed the telephone to M.C. and wrote something on a piece of paper.

Meanwhile, S.K., alarmed by defendant’s suicide threats, called the police. She then went to defendant’s house. There, she confronted defendant outside, by himself. Defendant confirmed that he had touched T.C., adding that he’d rather kill himself than go to prison. Later, M.C. and T.C. came outside, and defendant, at S.K.’s insistence, again acknowledged that he had touched T.C. Police arrived a short time later.

Upon arriving, police contacted S.K., who explained that defendant was suicidal. S.K. added that defendant called her earlier in the day and admitted to having touched T.C. over the preceding two years. Police interviewed T.C. at the scene. During the

interview, T.C. confirmed that she had been sexually abused by defendant more than 100 times over the preceding two years. T.C. added that defendant had sexually abused her earlier that day, by kissing her vagina, penetrating her with his finger, and partially penetrating her with his penis. T.C. noted that defendant had not ejaculated that day. Defendant was arrested following the interview.

Police recovered a handwritten note from the scene, which was signed by defendant and read, in part, “I, Walter Kotko, did an unforgiveable thing.” Police asked defendant at the scene what the “unforgiveable thing” mentioned in the note was. Defendant responded that he no longer loved M.C., and to him, that was unforgiveable. Police also recovered the clothes T.C. had been wearing earlier that day.

T.C. was physically examined by Cathy Boyle, a pediatric nurse practitioner and Sexual Assault Response Team (SART) expert at UC Davis Medical Center. T.C. told Boyle that defendant “kissed her down there” and “put his ding-a-ling in there.” Boyle collected swabs and examined T.C.’s genital area with a colposcope. Boyle also took photographs of T.C.’s hymen.

Although T.C. reported having been molested earlier that day, Boyle did not observe any acute injuries to her genital area. However, in reviewing the photographs, Boyle observed a deep cleft in T.C.’s hymen, which, though healed, was consistent with past sexual abuse. As Boyle would later testify, “deep clefts are more indicative of sexual abuse than any other thing and [are] not found in nonabused kids.” The photographs were subsequently reviewed by Dr. Debra Stewart, a child abuse expert, and Sheridan Miamoto, a nurse practitioner specializing in SART examinations. The group confirmed Boyle’s finding. During the trial, Boyle opined “to a medical certainty” that the deep cleft in T.C.’s hymen was caused by sexual abuse. Despite Boyle’s finding, none of defendant’s DNA was found on T.C.’s body or clothing, and none of T.C.’s DNA was found on defendant.

T.C. also participated in a Sexual Assault Forensic Evaluation (SAFE) interview. The SAFE interview was recorded and admitted into evidence, but not played for the jury. Cynthia Stinson, then a detective with the sexual assault unit of the Sacramento Police Department, observed the interview and testified as to T.C.'s account of the molestation. As described by Stinson, T.C.'s statements in the SAFE interview were consistent with her trial testimony. On cross-examination, Stinson acknowledged that M.C. requested a copy of the police report for "immigration services."

B. The Defense

1. Defendant's Testimony

Defendant testified on his own behalf. In an unusual turn of events, defendant testified on direct examination that he had been accused of sexually abusing yet another child: his daughter, Billie Jo, now deceased.⁴ Defendant explained that he had two daughters from a previous marriage: Billie Jo and S.K. The marriage ended and defendant moved to Sacramento, where he was eventually joined by Billie Jo and S.K., then ages 13 and 11. So far as he could recall, Billie Jo alleged that defendant touched her inappropriately on at least two occasions.⁵ First, Billie Jo alleged that defendant touched her breast. On direct examination, defendant admitted that he grabbed and squeezed Billie Jo's breast, but insisted that the touching was unintentional. On cross

⁴ During closing argument, defense counsel argued that defendant wanted to testify about Billie Jo's allegations because he wanted to be honest with the jury. As we shall discuss, the record suggests that defendant made a tactical decision to testify about Billie Jo's allegations after defense counsel inadvertently solicited testimony about them. (See Section II.C.1, *post*.)

⁵ The record is unclear as to whether Billie Jo accused defendant of touching her inappropriately on two or three occasions. During the trial, the prosecutor and defense counsel both indicated that defendant was alleged to have touched Billie Jo inappropriately on three occasions. However, defendant testified that he only remembered two such allegations. We need not resolve this inconsistency.

examination, defendant admitted that he told an investigating officer that he was wrestling with Billie Jo, and “got a handful of tit.” Defendant was not arrested or charged with any crime. Second, Billie Jo alleged that defendant placed his hand on her vagina over her clothes. Defendant denied touching Billie Jo’s vagina. Police investigated, but again, defendant was not arrested or charged with any crime.

Turning to B.T., defendant recalled that she came over to play with A.G. “[a]lmost every day.” Defendant acknowledged that B.T. slept over “quite a few times,” including times when S.K. was not there. However, defendant denied ever being alone with B.T., adding that A.G. was always present.

Shifting gears, defendant testified that he had long harbored doubts about the wisdom of his marriage to M.C. Although he loved M.C. and her children, he wondered whether she had married him for immigration purposes. He recalled that M.C. and T.C. regularly spoke to one another in Spanish in his presence, which he does not understand. He also recalled that there were frequent arguments and discussions of divorce in the days leading up to July 30, 2007. That day, defendant testified, he was preparing for a camping trip he planned to take the following month. T.C. asked defendant if she could accompany him on the trip, and defendant responded that she could not. According to defendant, T.C. became very upset and was crying; defendant decided to take a nap.

Defendant was lying down, wearing his underwear, but no pants or shirt, when he heard a noise on the porch. He jumped up, put on his pants, and ran to the window. He saw M.C.’s car outside, and then made his way to the door. As he passed, he saw T.C. sitting on the sofa. He told her, “wash your face before mom thinks I hit you or did something.” He then opened the screen door for M.C.

During the trial, defendant recalled that the screen door locked automatically from time to time as a result of dry rot falling into the locking mechanism. Defendant also recalled that M.C. was unaccountably angry from the moment he opened the door. According to defendant, “She was throwing things against the wall ask—saying: What’s

going on? What's going on? What's going on?" Defendant heard T.C. say she had stubbed her toe. Defendant, for his part, said that T.C. was upset because he told her that she could not go on the upcoming trip. But M.C. would not be mollified. Instead, in defendant's telling, M.C. kept asking a bewildered T.C., "What did [defendant] do to you?" As defendant would later recount, "She had [T.C.] stuck in the corner of the couch. [T.C.] couldn't move at all whatsoever. She was asking [T.C.] those questions. And T.C. kept saying: He never touched me. She don't even know what she's talking about. And just constantly saying that I never touched her." Eventually, defendant stepped outside to smoke a cigarette.

When he returned, M.C. was still asking T.C. whether defendant had touched her. According to defendant, "finally, after being how long it went on, finally I just went ahead and said: [M.C.], the only thing that you want to hear right now is if I told you, yes, I did. I said: You won't take no other answer." Shortly thereafter, M.C. and T.C. called S.K., and handed the phone to defendant.

M.C. continued screaming and yelling throughout defendant's telephone conversation with S.K., forcing defendant to repeat himself. As defendant would later explain, he initially told S.K. that, "[M.C.] wants me to tell you that I touched [T.C.]." Eventually, defendant said, after trying and failing to be heard over M.C.'s shouting, he shortened the statement to "I touched [T.C.]" Defendant denied touching T.C., and denied that he intended to communicate to S.K. having done so. Defendant acknowledged having written the note admitting he had done "an unforgivable thing." However, he testified that the "unforgiveable thing" was that he told T.C. he did not love her.

On cross-examination, defendant was shown a jailhouse letter to T.C. In the letter, defendant wrote, "You did the right thing when you did what you did. It took a lot of guts." Defendant also asked T.C. to forgive him. Defendant testified that he did not know what he was referring to when he wrote those things. Defendant was also asked

about a jailhouse telephone conversation with M.C. in which he said that S.K. was right to call the police and “I know I did wrong.” Defendant could not explain what he meant by those statements either.

2. Defense Experts

Dr. James Crawford-Jakubiak testified as an expert in pediatrics and the medical evaluation of child abuse. Dr. Crawford-Jakubiak explained that he reviewed T.C.’s SART examination and would have interpreted the results as normal. Dr. Crawford-Jakubiak continued, “If a child has a normal exam or unremarkable exam, it tells us that they were healthy. It’s possible that they were never sexual[ly] abused, and it’s possible they were sexually abused. It’s just that in those instances the medical exam cannot help the trier of fact make a decision what is the truth.”

Dr. Crawford-Jakubiak disagreed with Boyle’s finding that there was a deep cleft in T.C.’s hymen. Although Dr. Crawford-Jakubiak allowed that some of the photographs appeared to show a shallow or superficial notch, he did not believe that the photographs supported the conclusion that there was a deep cleft. Furthermore, Dr. Crawford-Jakubiak elaborated, “there’s no general consensus as to what a deep cleft means.” Although deep clefts are associated with healed abuse, medical experts cannot say with certainty that they were necessarily caused by abuse. As a result, Dr. Crawford-Jakubiak explained, even assuming that there was a deep cleft on T.C.’s hymen, he could not say with medical certainty that she was abused.

On cross-examination, Dr. Crawford-Jakubiak acknowledged that, “most children who have been sexually abused don’t have a physical injury as a consequence.” Consequently, Dr. Crawford-Jakubiak believed that, “The determination of whether sexual abuse did or did not occur will be based on that credibility of the historical information provided by the alleged victim[.]”

Marc Taylor testified for the defense as an expert in the transfer and collection of DNA. Taylor reviewed the work done by the prosecution’s DNA experts. He testified

that he would have expected to find defendant's DNA in T.C.'s vagina or underwear. Taylor also testified that he would have expected to find T.C.'s DNA on defendant's fingers or penis. Taylor also found fault with the prosecutor's experts for failing to perform additional "Y-STR" DNA testing on T.C.'s underwear samples and vaginal swabs.

Defendant also called Dr. Baljit Atwal, a forensic psychologist who specializes in sex offender risk assessments. Dr. Atwal evaluated defendant for the defense in 2009. As part of her evaluation, Dr. Atwal reviewed relevant documents, administered psychological tests, and interviewed defendant on three separate occasions. During the interviews, defendant offered relevant medical background and recounted significant milestones in his personal history, including his previous marriage and divorce, his relationship with M.C., and his relationships with Billie Jo and S.K. During the course of the interviews, defendant also disclosed that he had been accused of having sexually molested Billie Jo, B.T. and T.C.⁶ Defendant denied the allegations.

Based on her interviews, testing, and review of available records, Dr. Atwal concluded that defendant does not have the characteristics of a child molester. Dr. Atwal further opined that defendant tries to uphold social norms, exhibits good impulse control and tends not to be dishonest or manipulative. Dr. Atwal reported that defendant had a "very low" score on the Child Molest Scale of the Sexual Adjustment Inventory, indicating that "he presents a low risk of sexually harming children." On cross-examination, however, Dr. Atwal acknowledged that such tests are designed to predict what someone will do in the future, not determine whether or not they committed a sexual offense in the past.

⁶ We note, however, that defendant did not disclose that he had been accused of molesting Billie Jo until the third and final interview with Dr. Atwal.

3. *A.G.'s Testimony*

Defendant's grandson, A.G., also testified for the defense. A.G., now 26 years old, testified that he lived down the street from B.T. as a child. A.G. recalled that B.T. came over several times a week. A.G. also recalled several occasions in which B.T. was sexually inappropriate with him.

A.G. never observed anything inappropriate between defendant and B.T. A.G. testified that he had no memory of defendant summoning B.T. to the bedroom. Although defendant watched movies with A.G. and B.T., they did not watch movies in the bedroom, as the only television in the house was in the living room. A.G. denied that defendant touched him inappropriately.

Based on his observations and experience with defendant, A.G. does not believe that defendant is the kind of person who would have molested either B.T. or T.C.

II. DISCUSSION

A. *Prosecutorial Misconduct*

1. *Applicable Legal Standards*

When, as here, the prosecutor is alleged to have engaged in prosecutorial misconduct during closing argument, the question “ ‘is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.’ ” (*People v. Harrison* (2005) 35 Cal.4th 208, 244; see *People v. Clair* (1992) 2 Cal.4th 629, 663.) The prosecutor's statements are examined in the context of the entire argument and the instructions given to the jury. (See *People v. Morales* (2001) 25 Cal.4th 34, 44-46.) We also consider “ ‘whether the prosecutor's comments were a fair response to defense counsel's remarks.’ ” (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1337 (*Seumanu*); see *People v. Chatman* (2006) 38 Cal.4th 344, 386 [“Defendant's challenges to rebuttal must be evaluated in light of the defense argument to which it replied”].) We do not lightly infer that the jury drew the most,

rather than the least, damaging meaning from the prosecutor's statements. (*People v. Shazier* (2014) 60 Cal.4th 109, 144; *People v. Dykes* (2009) 46 Cal.4th 731, 771-772.)

If the prosecutor's comments constitute misconduct, we next consider whether the misconduct was prejudicial. The Fourteenth Amendment to the United States Constitution is violated when a prosecutor's misconduct infects the trial with such unfairness as to deny due process. (*People v. Tully* (2012) 54 Cal.4th 952, 1009.) The misconduct must be significant enough to deny a fair trial. (*Ibid.*) Before a federal constitutional error can be deemed harmless, a reviewing court must declare it was *harmless beyond a reasonable doubt*. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

Even if the prosecutor's misconduct does not result in a fundamentally unfair trial, California law is violated if the prosecutor uses deceptive or reprehensible methods in attempting to persuade the jury or the court. (*People v. Tully, supra*, 54 Cal.4th at pp. 1009-1010.) A violation of state law is cause for reversal only when it is *reasonably probable* that a result more favorable to the defendant would have occurred had the prosecutor not made the improper comment. (*People v. Milner* (1988) 45 Cal.3d 227, 245; *People v. Watson* (1956) 46 Cal.2d 818, 836.) In either case, only misconduct that results in prejudice requires reversal. (*People v. Fields* (1983) 35 Cal.3d 329, 363.)

2. *The Closing Arguments*

Defense counsel's closing argument revolved around the theme that the prosecutor was attempting to mislead the jury. Indeed, defense counsel began by announcing, "The theme that you are going to hear throughout my closing argument is how misled you have been by the district attorney in the presentation of evidence in the way that it was." Defense counsel made good on this promise by repeatedly accusing the prosecutor of duplicity.

Among other things, defense counsel argued the prosecutor was attempting to mislead the jury through the use of CALCRIM Nos. 375 and 1191, which deal with evidence of uncharged offenses. Specifically, defense counsel argued that the

instructions reduced the prosecution's burden of proof, undermining the presumption of innocence beyond a reasonable doubt. Defense counsel emphasized the requirement of proof beyond a reasonable doubt, reading some—but not all—of the jury instruction for circumstantial evidence (CALCRIM No. 224), and characterizing the instruction to mean, “tie goes to the defendant.”

With respect to B.T., defense counsel argued that evidence of uncharged, time-barred offenses was being used to “get that multiple victim enhancement” and “lower the standard of proof.” With respect to Billie Jo, defense counsel intimated that defendant wanted to testify about the allegations made by his deceased daughter because he wanted the jury to “know the truth.”

Defense counsel repeatedly called attention to the absence of DNA evidence, characterizing the trial as a credibility contest between defendant, on the one hand, and B.T. and T.C. on the other. According to defense counsel, “in a case involving sexual molestation or sexual misconduct, it's only the person's word. It is so easy in today's climate, so easy for anyone to say: You know what, this person touched me.”

Elaborating on the theme of witness credibility, defense counsel asked, “Did [T.C.] seem through the entire testimony to have a smirk on her face, to be smiling at several questions that were asked? It made me feel uncomfortable.” Moments later, defense counsel theorized that M.C.'s loveless marriage to defendant and precarious immigration status gave T.C. a motive to lie. Specifically, defense counsel suggested that M.C. pressured T.C. to falsely accuse defendant of sexual abuse so she would be allowed to remain in the country, speaking Spanish so that defendant would not understand she was proposing to frame him.

Defense counsel directed the jury's attention to CALCRIM No. 105, which encourages the jury to consider, in evaluating the credibility of witnesses, whether the witness understood the questions and answered them directly. (CALCRIM No. 105.) Defense counsel then reminded the jury that M.C. relied on an interpreter. Defense

counsel implied that the interpreter was not necessary, as there was evidence that M.C. spoke “broken English.”

Turning to B.T., defense counsel argued that she was “a thief and a liar.” He urged the jury to review the video recording of B.T.’s forensic interview, claiming her prior statements were inconsistent with her trial testimony.

Returning to the theme of misdirection, defense counsel argued the prosecutor had attempted to mislead the jury—and defendant—in his presentation of evidence of defendant’s jailhouse conversations. Noting that the prosecutor played audio recordings of two such conversations, but merely referred to others, defense counsel asked, “Why is it, ladies and gentlemen, that only these two were played, but the others were not played, that he was just questioned on them?” By way of response, defense counsel noted that defendant denied making some of the statements that were attributed to him, and opined that the prosecutor’s presentation of the evidence was “misleading, misleading, misleading” and designed to “confuse[] an old man on the stand.”

Shifting gears, defense counsel referred to A.G.’s testimony outside the presence of the jury in a section 402 hearing. The prosecutor objected, and the trial court responded, “Counsel, please.” Defense counsel moved on, exhorting the jury to “Remember, that the district attorney misled you in many regards.”

Defense counsel then touched on the jailhouse letter in which defendant wrote that T.C. “did the right thing” and it “took a lot of guts,” arguing that the statements were intended to encourage T.C. to “tell the truth.” Defense counsel concluded by reminding the jury that the prosecution presented no DNA evidence against defendant. With that, the jury was excused for the day.

The prosecutor delivered his rebuttal argument the next morning. By way of introduction, the prosecutor stated: “I’m acutely aware that I am the only thing standing between you and beginning your deliberation. So I won’t take long. But because I was portrayed as, essentially, a comic villain yesterday for about two and a half hours, I do

have some things I need to respond to.” Moments later, the prosecutor offered the following rebuke: “If you recall yesterday there were a number of things [defense counsel] had said that I had objected to and were sustained. Things like: We were prevented from doing things, and there were hearings that you didn’t hear.^[7] [¶] *Those things are inappropriate to be brought to your attention. [Defense counsel] knew that. He knew I would object. He knew it would be sustained, but he did it anyway. Why? Why would he do that?*”⁸

The prosecutor continued: “Those things are not evidence. They are not for your consideration. They are obviously things that occurred outside of this courtroom that aren’t of your concern. If there was anything you needed to know, you would know. [¶] *So why did he do it? Quite simply it’s to inject poison into your process, to derail the orderly process of your analysis of the evidence and derail it to distract you. [¶] Because that process, left to run its course points only in one direction: The overwhelming guilt of the defendant. [¶] So he has to distract you. He has to compromise the integrity of the process itself. And that is disingenuous and shouldn’t be done.*”

The prosecutor went on: “[This] was done a number of times, particularly, with the instruction about using Billie Jo’s accusation against the defendant. [¶] He was talking about my use of the jury instructions in some inappropriate manner to lower some standard. *I don’t know if he slept through fifth grade civic class or not, but there are three branches of government.*” Here, defense counsel objected for the first and, for our

⁷ During closing argument, defense counsel also indicated that the defense was not allowed to present evidence of the complaining witnesses’ motive to lie, drawing an objection by the prosecution, which was sustained.

⁸ Here, and throughout this opinion, we have italicized the statements alleged to constitute misconduct.

purposes, only time, stating, “This is a personal attack.” The trial court responded, “All right. [¶] Go ahead, counsel.” Defense counsel did not seek a clear ruling on the objection or request a curative admonition. Defense counsel did not object to any of the other statements alleged to constitute misconduct.

The prosecutor returned to the theme of “poison” several times in rebuttal. On one occasion, the prosecutor accused defense counsel of mischaracterizing defendant’s trial testimony, stating, “Why would he do that? Why would he tell you something the defendant said that he didn’t say on the stand? [¶] To distract you from the evidence and to *inject poison into your process.*” On another occasion, the prosecutor accused defense counsel of dehumanizing B.T. and T.C., stating, “He knows what he’s doing. Dehumanize them and then distract you and *inject poison into [the] deliberation process.*” On yet another occasion, the prosecutor accused defense counsel of misrepresenting defendant’s reasons for testifying on direct about the uncharged incident involving Billie Jo, stating, “He’s suggesting there was an altruistic reason why he volunteered that information when that’s not true. [¶] Again, *poison into your process.* Distract you from the evidence and *compromise the integrity of your job.* That’s what he’s doing.”

The prosecutor suggested that defense counsel was attempting to trick or confuse the jury. Towards the beginning of his rebuttal, the prosecutor argued that defense counsel employed a “typical lawyer trick” by reading some, but not all, of the jury instruction for circumstantial evidence to the jury. Later, the prosecutor argued that defense counsel mischaracterized defendant’s testimony, stating, “There were a few other things [defense counsel] said that he attributed to Mr. Kotko that Mr. Kotko didn’t say. *Maybe Mr. Kotko forgot to follow the transcript he was given from [defense counsel].* But that’s not what the evidence is.”

The prosecutor also accused defense counsel of attempting to mislead the jury. In response to defense counsel’s argument that the prosecutor attempted to mislead the jury

in the presentation of evidence of defendant's jailhouse calls, the prosecutor said, "And the jail calls yesterday. You heard two of them. Mr. Kotko was asked about them. I think all but one he verified, eliminating the need for them to be played. But for Mr. Kotko—for [defense counsel] to argue to you that they don't exist? *That's disingenuous.* [¶] *We have an obligation not to argue things we know to be false to you. And to argue that those are manufactured and created is just disingenuous, which is lawyer speak for lying to you.*"

Later, in response to defense counsel's argument that defendant wanted to testify about the incident involving Billie Jo because he wanted the jury to "know the truth," the prosecutor argued, "[Defense Counsel] said Mr. Kotko volunteered the allegation about Billie Jo to you all because he just wanted to be honest. I'm assuming it had absolutely nothing to do with the fact that he was going to be subjected to my cross-examination, and I was going to ask about it. [¶] *[Defense counsel] knew that.* But he's telling you that he volunteered it on his own, that he didn't have to get into it. *That's not true.* [¶] Again, it's not evidence. What he's telling you—the reasons behind why he asked certain questions is not evidence. But I have to respond to it because he's suggesting it to you. *He's suggesting there was an altruistic reason why he volunteered that information when that's not true.*" The prosecutor then reiterated that defense counsel was trying to poison the jury's deliberative process.

The prosecutor also took defense counsel to task for his treatment of the victims. In response to defense counsel's suggestion that it is "easy" for an alleged victim to accuse someone of sexual molestation, the prosecutor sarcastically remarked, "Boy, yes. We have made the benefits of accusing people of sexual molestation incredible in this country. The world opens up to you when you accuse someone of touching. There are no negative ramifications to that. The examinations, the days spent on the witness stand. [¶] *That's just in this room. Let's not even consider the ramifications outside. Your childhood friends and mothers come in and sell you out on the witness stand.* [¶] *Every*

shred of privacy and dignity is eroded so that it can be used to paint you as a liar with absolutely no basis [or] foundation for it.”

Later, responding to defense counsel’s attempts to raise questions about the victims’ credibility, the prosecutor argued, “We know they *dug . . . through their lives. They brought in childhood friends, and they knew every in and out of every secret of their life.* Where is it? [¶] Just like we don’t convict people on accusations alone, *you don’t get to call people liars without a shred of proof.”*

The prosecutor then addressed defense counsel’s theory that M.C.’s immigration status gave her a motive to lie, noting that the defense failed to present evidence that she received any special status or consideration as a result of the case against defendant. The prosecutor then asked, “So what is he left with? Supposition, speculation, and innuendo. [¶] *Take advantage of an immigrant. Only in this room does being an immigrant become sinister. Only in this room does speaking Spanish to your daughter become sinister* because that’s how it was portrayed. Spanish language is the code they would talk in to set up poor old Mr. Kotko. That’s how it was portrayed.”

Later still, returning to the subject of defense counsel’s treatment of the victims, and recalling that counsel had characterized T.C. as wearing a smirk on her face throughout her testimony, the prosecutor argued, “Imagine what we are asking of these people to come in and do. They have lived through this ordeal, and now they have to answer these questions. And every single part of their life, every lie they have told as a child, every misdeed as a child is now used to paint them as liars and dishonest people because they have come in and answered questions, after question, after question. [¶] The expectations we have of these people to call them liars is ridiculous. [¶] And they did it. And they answered their questions as best they could. And they told you what they did. And [defense counsel]’s classification of them, his treatment of them, the smirking liar [referring to T.C.], it’s *dehumanizing* them. *He did it with his words like his client did with his hands.* [¶] *And that’s by design.* He’s a talented lawyer. *He knows*

what he's doing." The prosecutor then reiterated that defense counsel was trying to "dehumanize" the victims and "inject poison" into the jury's deliberative process.

The prosecutor also argued that defense counsel spent more time attacking the prosecution in closing argument than addressing the evidence, asking, "Why would he spend so much time talking about things that weren't the evidence?" The prosecutor estimated that defense counsel spent fourteen minutes responding to the prosecution's percipient witnesses and fifty-five minutes responding to the prosecution's expert witnesses, adding, "The rest he saved for me, which I enjoyed." The prosecutor continued, "Make me part of the conspiracy. Because every second he spends talking about me, is one less second he's talking about the evidence that matters to your decision. [¶] So tear me up. . . . Call me the big bad government. Call me misleading. Call me the sinister prosecutor. I'll take it. I'll embrace it *because it's nothing but a desperate attempt to avoid responsibility for the defendant that he so richly deserves. That's why it was done.*" The prosecutor concluded his remarks a short time later.

3. *Forfeiture and Ineffective Assistance of Counsel*

As a general rule, a claim of prosecutorial misconduct is preserved for appeal " 'only if the defendant objects in the trial court *and* requests an admonition, or if an admonition would not have cured the prejudice caused by the prosecutor's misconduct.' " (*People v. Lopez* (2013) 56 Cal.4th 1028, 1072, abrogated on another ground in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.) "The primary purpose of the requirement that a defendant object at trial to argument constituting prosecutorial misconduct is to give the trial court an opportunity, through admonition of the jury, to correct any error and mitigate any prejudice. [Citation.] Obviously, that purpose can be served only if defendant is required to, and does, raise any objection before the jury retires." (*People v. Williams* (1997) 16 Cal.4th 153, 254.)

The People argue that defendant has forfeited all of his claims of prosecutorial misconduct, except for the claim based on the prosecutor's suggestion that defense counsel must have slept through "fifth grade civic class."

Recognizing the forfeiture problem, defendant argues his counsel was ineffective for failing to object. " 'A defendant whose counsel did not object at trial to alleged prosecutorial misconduct can argue on appeal that counsel's inaction violated the defendant's constitutional right to the effective assistance of counsel.' " (*People v. Centeno* (2014) 60 Cal.4th 659, 674 (*Centeno*)). To establish ineffective assistance of counsel, defendant must show, by a preponderance of the evidence, that " '(1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient performance was prejudicial, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant.' " (*People v. Johnson* (2015) 60 Cal.4th 966, 980.) As we shall explain, the prosecutor's comments were harmless, and therefore, defense counsel did not provide ineffective assistance by failing to object.

4. *Specific Claims of Misconduct*

Defendant argues the prosecutor committed multiple acts of misconduct by repeatedly denigrating defense counsel in his rebuttal argument. For ease of analysis, we have sorted the allegedly improper statements into two groups: (1) statements impugning defense counsel's integrity, and (2) statements characterizing defense counsel as an "additional attacker." We consider each category in turn.

a. *Impugning Defense Counsel's Integrity*

"Personal attacks on the integrity of opposing counsel can constitute misconduct. [Citation.] 'It is generally improper for the prosecutor to accuse defense counsel of fabricating a defense [citations], or to imply that counsel is free to deceive the jury [citation]. Such attacks on counsel's credibility risk focusing the jury's attention on irrelevant matters and diverting the prosecution from its proper role of commenting on

the evidence and drawing reasonable inferences therefrom.’ [Citation.] However, ‘the prosecutor has wide latitude in describing the deficiencies in opposing counsel’s tactics and factual account.’ [Citation.]” (*People v. Winbush* (2017) 2 Cal.5th 402, 484.)

Thus, a prosecutor may use colorful language to criticize defense counsel’s tactical approach when the language is not a personal attack on counsel’s integrity. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1154-1155 [defense counsel’s argument was “a ‘lawyer’s game’ and an attempt to confuse the jury by taking the witness’s statement out of context”], disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Stitely* (2005) 35 Cal.4th 514, 559 [jurors should “avoid ‘fall[ing]’ for [defense] counsel’s argument” and should view it as a “ ‘ridiculous’ attempt to allow defendant to ‘walk’ free,” and a “ ‘legal smoke screen’ ”]; *People v. Young* (2005) 34 Cal.4th 1149, 1193 [prosecutor’s characterization of defense counsel’s argument as “ ‘idiocy’ ” was fair comment on counsel’s argument]; *People v. Taylor* (2001) 26 Cal.4th 1155, 1167 [reference to “defense ‘tricks’ or ‘moves’ used to demonstrate a witness’s confusion or uncertainty”]; *People v. Medina* (1995) 11 Cal.4th 694, 759 [“ ‘any experienced defense attorney can twist a little, poke a little, try to draw some speculation, try to get you to buy something’ ”].)

“An argument which does no more than point out that the defense is attempting to confuse the issues and urges the jury to focus on what the prosecution believes is the relevant evidence is not improper.” (*People v. Cummings* (1993) 4 Cal.4th 1233, 1302, fn. 47; see *People v. Bell* (1989) 49 Cal.3d 502, 538 [“ ‘It’s [defense counsel’s] job to throw sand in your eyes, and he does a good job of it’ ”]; *People v. Williams* (1996) 46 Cal.App.4th 1767, 1781 [defense counsel had to “ ‘obscure the truth’ and confuse and distract the jury” and “counsel’s argument was not made in ‘pursuit of the truth’ but was instead meant to ‘deceive,’ ‘distract,’ and ‘confuse’ the jurors”]; *People v. Goldberg* (1984) 161 Cal.App.3d 170, 190 [defense counsel’s “job” is to confuse the jury about the issues].) Such comments can be “understood as a reminder to the jury that it should not

be distracted from the relevant evidence and inferences that might properly and logically be drawn therefrom.” (*People v. Bell*, *supra*, at p. 538.) With this background in mind, we now consider the specific statements said to impugn defense counsel’s integrity.

We begin with the prosecutor’s supposition that defense counsel deliberately made an objectionable argument in order to distract the jury. Viewing the record as a whole, we do not believe the jury would have construed the prosecutor’s argument as a personal attack on defense counsel, rather than a comment on defense counsel’s tactics. Although the prosecutor derided defense counsel’s tactics as “inappropriate” and “disingenuous,” we do not believe the jury would have understood the prosecutor to imply that defense counsel was personally dishonest or unethical. Rather, the jury would have understood the prosecutor’s comments as a fair response to defense counsel’s argument that the prosecutor was attempting to mislead them.

We are similarly unmoved by the contention that the prosecutor committed misconduct when he described defense counsel’s objectionable argument as an attempt to “inject poison into your process.” Although the prosecutor used colorful language, the context of the statement makes clear that the prosecutor was referring to defense counsel’s attempt to distract the jury. We reiterate that the prosecutor returned to the theme of “poison” several times in rebuttal, always in the context of warning the jury that defense counsel was trying to distract them. Reading the record as a whole, we are convinced the jury would have understood the prosecutor’s recurring references to “poison” to target defense counsel’s tactics, rather than defense counsel personally. (See, e.g., *People v. Cunningham* (2001) 25 Cal.4th 926, 1002, 1003 [prosecutor’s argument that defense counsel’s “ ‘job is to create straw men’ ” and “ ‘put up smoke, red herrings,’ ” would have been “understood by the jury as an admonition not to be misled by the defense interpretation of the evidence, rather than as a personal attack on defense counsel”].) There is no reasonable likelihood the jury construed the remarks as an attack on defense counsel’s integrity.

The prosecutor's statement that defense counsel was trying to "compromise the integrity of the process itself" presents a closer question. We can see how, in isolation, the statement could be construed as imputing an unethical or corrupt purpose to defense counsel. Taken in context, however, the statement can be properly understood as a variation on the theme that defense counsel was trying to distract the jury. Although the prosecutor's words were poorly chosen, they can be reasonably understood to reiterate that the jury should not be distracted from the relevant evidence. (See *People v. Cummings, supra*, 4 Cal.4th at p. 1302, fn. 47.) Accordingly, we conclude the prosecutor's remarks, though arguably close to the line, do not amount to misconduct. (*People v. Cortez* (2016) 63 Cal.4th 101, 131 ["we do 'not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations'"].)

We agree with defendant that the prosecutor crossed the line by suggesting that defense counsel "slept through fifth grade civic class." "Personal attacks on opposing counsel are improper and irrelevant to the issues." (*People v. Sandoval* (1992) 4 Cal.4th 155, 184; see also *People v. Hill* (1988) 17 Cal.4th 800, 832 ["'An attack on the defendant's attorney can be [as] seriously prejudicial as an attack on the defendant himself, and, in view of the accepted doctrines of legal ethics and decorum [citation], it is never excusable'"].) The prosecutor's jab was intemperate and unprofessional. That said, it is not reasonably likely the jury understood or applied the remark to defendant's detriment. The prosecutor's put down was brief and obviously sarcastic. Although the prosecutor should not have subjected defense counsel to ridicule, however brief, the remark was "clearly recognizable as an advocate's hyperbole," and would have been discounted by the jury, even absent an admonition, which defendant failed to request. (*People v. Sandoval, supra*, 4 Cal.4th at p. 184 [no prejudicial misconduct where improper remarks "were a small part of the prosecutor's very lengthy review of the

evidence presented”].) Accordingly, we perceive no reasonable possibility that the jury would have construed or applied the prosecutor’s remark in an objectionable manner.

Moving on, we find no misconduct in the prosecutor’s statement that defense counsel had employed a “pretty typical lawyer trick.” Here again, the prosecutor did no more than tell the jurors not to be sidetracked by defense tactics, which has consistently been found to constitute appropriate argument. (See, e.g., *People v. Taylor, supra*, 26 Cal.4th at p. 1167 [it is not improper for a prosecutor to argue that defense counsel used “ ‘tricks’ ” and “ ‘moves’ ” to confuse a witness].) We are also unconvinced that the prosecutor crossed the line when he speculated that defendant “forgot to follow the transcript he was given.” Viewed in context, the prosecutor’s remarks are more reasonably understood as an admonition that defense counsel’s argument was not evidence. We see no reasonable likelihood the jury would have understood the prosecutor’s comments to imply that defense counsel colluded with defendant to present scripted testimony. Again, we do not lightly infer that the jury drew the most damaging rather than the least damaging inferences from the prosecutor’s statements. (*People v. Cortez, supra*, 63 Cal.4th at p. 131.)

We also find no misconduct in the prosecutor’s argument that, lacking a plausible defense theory, defense counsel resorted to “*Tak[ing] advantage of an immigrant*,” or the immediately ensuing statement that, “*Only in this room does being an immigrant become sinister. Only in this room does speaking Spanish to your daughter become sinister* because that’s how it was portrayed.” The prosecutor’s references to M.C.’s immigration status were fair responses to defense counsel’s argument that M.C.’s status gave her a motive to lie. As such, they “ ‘did little more than urge the jury not to be influenced by [defense] counsel’s arguments, and to instead focus on the testimony and evidence in the case.’ [Citation].” (*People v. Dykes, supra*, 46 Cal.4th at p. 771 [no misconduct where prosecutor’s references to race represented fair rebuttal to defense counsel’s suggestion that prosecution attempted to play on all-White jury’s racial prejudice].) Likewise, the

prosecutor's references to speaking Spanish were a fair response to defense counsel's argument that M.C.'s use of an interpreter made her testimony less credible. It was also a fair response to the defense theory that M.C. and T.C. plotted against defendant in Spanish. The prosecutor's arguments cannot fairly be construed to imply that defense counsel harbored animus against Spanish-speaking immigrants.

The People effectively concede that the prosecutor exceeded the bounds of permissible vigor when he accused defense counsel of making a "disingenuous" argument, which he defined as "lawyer speak for lying to you," and implying that defense counsel violated "an obligation not to argue things we know to be false to you." (See *People v. Young*, *supra*, 34 Cal.4th at p. 1193 ["We agree that to the extent the prosecutor characterized defense counsel as 'liars' or accused counsel of lying to the jury, the prosecutor's remarks constituted misconduct"].) We accept the People's concession, and conclude the comments were harmless. The comments were made in response to defense counsel's argument that the prosecutor presented evidence of defendant's jailhouse conversations in an underhanded and deceptive manner, which the prosecutor reasonably interpreted as a personal affront. Although the prosecutor should not have engaged defense counsel in a tit for tat exchange of insults, "[i]t is reasonably likely that the jurors viewed the prosecutor's remarks as mere reciprocal retort" to a defense attack on the prosecutor, "and gave it little to no consideration." (*Ibid.*)

We perceive no misconduct in the prosecutor's response to defense counsel's argument that defendant testified about the uncharged incident involving Billie Jo because he wanted the jury to "know the truth." Although the prosecutor decried defense counsel's argument as "not true," the characterization was a fair comment on the defense argument, rather than a personal attack on defense counsel. (See, e.g., *People v. Young*, *supra*, 34 Cal.4th at p. 1193 [prosecutor's characterization of defense counsel's argument as "'idiocy'" was fair comment on counsel's argument].) Our Supreme Court rejected a similar claim in *People v. Stanley* (2006) 39 Cal.4th 913, 952. There, the prosecutor

argued that defense counsel “ ‘imagined things that go beyond the evidence’ ” and told the jury “a ‘bald-faced lie.’ ” (*Ibid.*) The court found the prosecutor’s remarks were merely responsive to defense counsel’s argument, adding, “[t]he prosecutor’s argument, although intemperate in tone, did little more than urge the jury not to be influenced by counsel’s arguments, and to instead focus on the testimony and evidence in the case. [Citation.]” (*Ibid.*) Likewise, in the present case, the prosecutor’s remarks were aimed at the persuasive force of defense counsel’s closing argument and not at counsel personally.

We are also unpersuaded by defendant’s contention that the prosecutor committed misconduct when he argued that defense counsel’s focus on the prosecutor was “*nothing but a desperate attempt to avoid responsibility for the defendant that he so richly deserves. That’s why it was done.*” According to defendant, the prosecutor’s characterization of defense counsel as “desperate” implied that counsel did not believe in his client’s case, and was thus analogous to the statement that defense counsel “will make any argument he can to get that guy off,” which was deemed “grossly improper” by the federal appellate court in *United States v. Friedman* (2d Cir. 1990) 909 F.2d 705, 709. In our opinion, a more reasonable reading of the record is that the prosecutor viewed defense counsel’s sustained attack on him as a desperate attempt to focus the jury’s attention on something other than the evidence. Indeed, the challenged statement was preceded by the prosecutor’s statement that he welcomed defense counsel’s attacks, “Because every second he spends talking about me, is one less second he’s talking about the evidence that matters to your decision.” On this record, we agree with the People that the prosecutor’s statement more closely resembles an admonition to the jury not to be distracted from the relevant evidence. As we have discussed, such statements do not amount to an impermissible attack on defense counsel’s personal integrity and do not constitute prosecutorial misconduct.

We therefore conclude that, with the exception of the statement that defense counsel must have “slept through fifth grade civic class” and the suggestion that defense

counsel was lying to the jury, which were harmless, the prosecutor did not commit misconduct by disparaging defense counsel's integrity.

b. Statements Accusing Defense Counsel of Acting as an Additional Attacker

We now come to the prosecutor's statements regarding the victims. As noted, the prosecutor argued that: (1) as a victim, "*Your childhood friends and their mothers come in and sell you out on the witness stand. [¶] Every shred of privacy and dignity is eroded so that it can be used to paint you as a liar with absolutely no basis [or] foundation for it*"; (2) with respect to the defense effort to impeach the victims, "*We know they dug . . . through their lives. They brought in childhood friends, and they knew every in and out of every secret of their life. Where is it? [¶] Just like we don't convict people on accusations alone, you don't get to call people liars without a shred of proof*"; and (3) with respect to defense counsel's treatment of the victims, "*it's dehumanizing them. He did it with his words like his client did with his hands. [¶] And that's by design. He's a talented lawyer. He knows what he's doing. Dehumanize them and then distract you and inject poison into [the] deliberation process.*"

Arguing by analogy to *People v. Turner* (1983) 145 Cal.App.3d 658, 673 (*Turner*) (disapproved on other grounds in *People v. Majors* (1998) 18 Cal.4th 385, 411) and *People v. Newman* (1999) 21 Cal.4th 413, 415, defendant contends the prosecutor committed misconduct by casting aspersions on the exercise of his constitutional rights and characterizing defense counsel as an additional attacker. We conclude the prosecutor crossed the line in analogizing defense counsel to an accused child molester. We reject defendant's other claims.

In *Turner*, a rape case, the prosecutor characterized the victim as " 'doubly the victim in this case' " inasmuch as she was required to recount the crime to numerous strangers during the course of the investigation and ensuing trial. (*Turner, supra*, 145 Cal.App.3d at p. 672.) Expanding on this theme, the prosecutor implied that defense

counsel contributed to the victim's ordeal, telling the jury they could see " 'what that's like being questioned by the attorney for your attacker. You've seen what that's like.' " (*Ibid.*, italics omitted.) The prosecutor then argued the victim had been " 'attacked by a trained lawyer who's hired by the defendant.' " (*Ibid.*, italics omitted.)

The defendant argued the prosecutor committed misconduct, and the *Turner* court agreed, stating: "We have no quarrel with the prosecutor's theory that it was necessary for him to buttress [the victim's] credibility by explaining the rigors through which she had to proceed, starting with the indignity of the offenses and continuing through the numerous judicial proceedings." (*Turner, supra*, 145 Cal.App.3d at p. 673.) "However," the court continued, "the prosecution overreacted when he included Turner's lawyer as an additional villain who was attacking the victim. In referring to Turner's attorney in the manner that he did, the prosecutor obviously was casting aspersions on both Turner's constitutional right to defend himself and his right to be represented by counsel. [Citations.] A criminal defense lawyer may properly attack a witness' credibility even though that witness is also the victim of the crime. The prosecutor, however, commits misconduct when, through the careful use of words, he labels defense counsel as an additional attacker in a prosecution of a violent offense." (*Id.* at pp. 673-674.)

Applying these principles, we find no misconduct in the prosecutor's argument that B.T. and T.C. suffered losses of privacy and dignity during the trial. Contrary to defendant's suggestion, the prosecutor's statements did not portray defense counsel as an additional attacker or cast aspersions on the exercise of defendant's constitutional rights. *People v. Pitts* (1990) 223 Cal.App.3d 606, on which defendant relies, does not convince us otherwise. In *Pitts*, the defense called a child victim to the stand to deny she had been molested by her father. (*Id.* at pp. 704-705.) The prosecutor attacked defense counsel for doing so, arguing, in essence, that defense counsel "contribut[ed] to the ruination" of the child's life. (*Id.* at p. 705.) Here, by contrast, the prosecutor merely outlined the rigors

of trial. The prosecutor did not suggest that defense counsel contributed to the victims' ordeal.

Nor did the prosecutor cast aspersions on defendant's right to investigate the complaining witnesses or call witnesses to impeach them. Although the prosecutor's statements presupposed that a defense investigation was conducted and impeachment witnesses called, they cannot reasonably be construed as casting aspersions on the exercise of defendant's constitutional rights. Rather, the statements are more reasonably viewed as an attempt to bolster B.T. and T.C.'s credibility by describing the rigors they endured. (*Turner, supra*, 145 Cal.App.3d at p. 673.) It is not reasonably probable the jury interpreted the prosecutor's statements as vilifying defense counsel.

We cannot say the same for the prosecutor's argument that defense counsel "dehumanized" the victims and "did it with his words like his client did with his hands," which was clearly improper. As the People concede, these comments improperly compared defense counsel to a child molester, implying that counsel victimized or violated B.T. and T.C. "with his words." There is no question that such inflammatory comments constitute misconduct. (*Turner, supra*, 145 Cal.App.3d at p. 674; see also *People v. Vance* (2010) 188 Cal.App.4th 1182, 1201 [" ' "It is, of course, improper for the prosecutor 'to . . . portray defense counsel as the villain in the case' " ' "].) There is no reasonable probability that the jury could have construed or applied the prosecutor's remarks in a non-objectionable fashion. We therefore conclude the prosecutor's inappropriate analogy constituted prejudicial misconduct. Having so concluded, we consider whether the misconduct requires reversal.

Although the prosecutor approached and even exceeded the bounds of permissible vigor on several occasions, we see no basis to conclude that he engaged in a pattern of improper argument that would constitute a violation of federal due process. (*People v. Tully, supra*, 54 Cal.4th at p. 1009.) The challenged statements were confined to the prosecutor's rebuttal argument, which consumes 16 pages in a seven-volume trial

transcript containing more than 1800 pages. Although three of the prosecutor's arguments crossed the line—the argument that defense counsel slept through fifth grade civics class, the suggestion that defense counsel lied to the jury, and the argument that defense counsel victimized B.T. and T.C. “with his words like his client did with his hands”—these remarks were “a small part of the prosecutor’s very lengthy review of the evidence presented” (*People v. Sandoval, supra*, 4 Cal.4th at p. 184), and “when viewed in the context of the entire argument . . . could not have inflamed the jury’s passions to the point where the outcome of the trial was affected or the trial became fundamentally unfair.” (*People v. Rundle* (2008) 43 Cal.4th 76, 162, disapproved on another ground in *People v. Doolin, supra*, 45 Cal.4th at p. 421, fn. 22.) Contrary to defendant’s contention, this was not a case in which “improper comments and assertions [were] interspersed throughout trial and/or closing argument” (*People v. Pitts, supra*, 223 Cal.App.3d at p. 692) or “the sheer number of instances of prosecutorial misconduct and other legal errors raises the strong possibility the aggregate prejudicial effect of such errors was greater than the sum of the prejudice of each error standing alone.” (*People v. Hill, supra*, 17 Cal.4th at p. 845; see also *Seumanu, supra*, 61 Cal.4th at p. 1350 [recognizing that multiple instances of prosecutorial misconduct “may act synergistically to create an atmosphere of prejudice more intense than the sum of its parts”].) Even viewing all instances of misconduct collectively, as defendant urges, we cannot say that they “ “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” ’ ’ ” (*People v. Letner and Tobin, supra*, 50 Cal.4th at p. 169.) We therefore conclude that defendant was not deprived of due process of law under the federal Constitution. (*Ibid.*)

We further conclude the improper arguments we have identified in the People’s closing argument did not change the outcome of the trial. The challenged statements came at the end of a long trial in which the jury heard overwhelming evidence that defendant sexually abused two different girls in a similar manner over a period of years.

Although defendant challenges the victims' credibility, we do not reweigh credibility determinations, as that was the jury's function.

A reasonable jury could have believed B.T.'s testimony, which was remarkably coherent given the passage of time and B.T.'s apparent limitations. B.T.'s testimony was corroborated by the video recording of her forensic interview in 1998, in which she offered a similar account of abuse at defendant's hands. B.T.'s testimony was also corroborated by S.K., who testified that B.T. was a regular guest in defendant's home during the period in question, and sometimes spent the night in defendant's room. B.T.'s testimony was also corroborated by B.T.'s prior statements to Davitto. A reasonable jury could also believe T.C., whose testimony was corroborated by her prior consistent statements to law enforcement, Boyle's SART findings, and defendant's multiple admissions against interest, which were themselves corroborated by M.C. and S.K.

By contrast, no reasonable jury would have believed defendant's implausible story that he only admitted to touching T.C. because M.C. wanted him to do so, particularly inasmuch as M.C., T.C. and S.K. unanimously testified that defendant admitted to having touched T.C. inappropriately on several occasions on July 30, 2007. Nor would a reasonable jury believe defendant's shifting explanations for the "unforgivable thing" he admitted to having done, both verbally and in writing, on the day he was discovered. It beggars belief that a person who has just been accused of molesting a child would choose that moment to write a note admitting, in the most oblique possible terms, that he no longer loved his wife, as defendant told police. It also strains credulity to imagine that a person in defendant's situation would intend, through the use of the phrase "unforgiveable thing," to convey that he no longer loved the child he had just been accused of molesting, as defendant would later suggest. No reasonable jury would believe either of these explanations for defendant's damning choice of words, particularly in light of S.K.'s uncontroverted testimony that defendant used the phrase "unforgiveable

thing” in a telephone conversation in which he specifically admitted to having inappropriately touched T.C.

Compared to the mountain of evidence against defendant, the prejudicial impact of the prosecutor’s improper remarks appears to us to be minimal. Ultimately, given the strength of the prosecution’s case, and the weakness of the defense, we perceive no reasonable probability that defendant would have obtained a more favorable result absent the prosecutor’s misconduct. (*People v. Sandoval, supra*, 4 Cal.4th at p. 194; *People v. Watson, supra*, 46 Cal.2d at p. 836.)

5. *Alleged Misstatements of the Law*

Next, defendant argues the prosecutor committed misconduct by mischaracterizing the burden of proof and presumption of innocence. The prosecutor highlighted several instructions in closing argument, using slides to display the relevant text to the jury. When he reached the jury instruction for reasonable doubt (CALCRIM No. 220), the prosecutor said, “Proof that leaves you with an abiding conviction that the charge is true. Did it happen? *Are you convinced? Within reason?* Because everything is open to some imaginary doubt, and you can’t accept that because we are human beings. [¶] And the law, despite it being *boring and wordy*, recognizes the human condition. The frailty of what is a human being. There are sometimes imperfections; there are flaws. No one is perfect, and our standard isn’t perfected. [¶] *Beyond a reasonable doubt means it makes sense to you.*”

The prosecutor continued: “The evidence need not eliminate all possible doubt, what I just said. Your job is to impartially compare and consider all the evidence throughout the trial. Look at it all. [¶] . . . [¶] . . . Look at any piece of evidence in comparison, contrast—in contrast with all the other evidence and *see if it makes sense*. [¶] *Reasonable doubt, again, commonsense, reason, and logic*. That’s how we make our decisions.”

During the defense closing argument, defense counsel addressed the burden of proof, emphasizing that the standard of proof beyond a reasonable doubt is “the highest standard we have in our land,” and adding that, “If you take someone’s freedom, convict somebody of heinous crimes, then this is [the] standard by which the jury must use to convict.” Moments later, defense counsel read aloud from the jury instruction regarding circumstantial evidence (CALCRIM No. 224), emphasizing the penultimate sentence, which directs the jury to choose reasonable conclusions that point to innocence over those that point to guilt, and omitting the last sentence, which provides, “when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable.”⁹ According to defense counsel, the instruction should be understood to mean, “tie goes to the defendant.”

In rebuttal, the prosecutor argued, “[Defense counsel] read to you the entire instruction ending right here: Conclusion points to innocence and guilt, you must accept the one that points to innocence. [¶] And conveniently and peculiarly left off was this final line. It’s not uncommon. *It’s a pretty typical lawyer trick.* But it’s a pretty important line because what it says is *the tie doesn’t go to the defendant.* When considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable.” The prosecutor continued, “It says when the defendant offers you an unreasonable explanation for evidence, you have to reject it. *The tie does not go to the defendant.*” The prosecutor then argued that defendant’s explanations for the evidence were unreasonable.

⁹ CALCRIM No. 224, entitled “Circumstantial Evidence: Sufficiency of Evidence,” reads in pertinent part: “If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilty, you must accept the one that points to innocence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable.”

With respect to the standard of proof, the prosecutor argued, “And the standard of proof, [defense counsel]’s comment, is used for heinous cases. That’s not true. The standard of proof applies to all criminal cases. Whether it’s a capital death penalty murder or petty theft, DUI. It’s the same standard.” The prosecutor continued, “Why is he saying to you that it’s only used in heinous cases? Why? *When that’s not what the standard is?* [¶] . . . *To artificially elevate some standard of proof* that is used in every criminal case in every courtroom in every courthouse in this country every day. No more, no less.”

In response to defense counsel’s discussion of the presumption of innocence, the prosecutor argued, “[Defense counsel] talked a lot about the presumption of innocence. That’s gone. *The minute you get back into that deliberation room, that presumption is shed.* He was presumed innocent until he was proven guilty. And we have spent the last several weeks doing that. [¶] Each part of that presumption has been chipped away, *and now he is cloaked in guilt* by the evidence that has been presented, by his own words, by his own letters, by his own writing.”

6. *Forfeiture and Ineffective Assistance of Counsel*

Defense counsel did not object to any of the prosecutor’s alleged misstatements regarding the burden of proof or presumption of innocence. Defendant has therefore forfeited any claim that the prosecutor engaged in misconduct with respect to such statements. (*Seumanu, supra*, 61 Cal.4th at p. 1328; *People v. Tully, supra*, 54 Cal.4th at p. 1010; *People v. Thomas, supra*, 54 Cal.4th at pp. 938-939.)

Recognizing the forfeiture issue, defendant argues defense counsel was constitutionally ineffective by failing to object. (See *Centeno, supra*, 60 Cal.4th at p. 674 [“ ‘A defendant whose counsel did not object at trial to alleged prosecutorial misconduct can argue on appeal that counsel’s inaction violated the defendant’s constitutional right to effective assistance of counsel’ ”].) As before, we need not decide whether defense

counsel was constitutionally ineffective because we conclude that any misconduct was harmless.

“It is misconduct for a prosecutor to misstate the law during argument. [Citation.] This is particularly so when the misstatement attempts ‘to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements. [Citation.]’ ” (*People v. Otero* (2012) 210 Cal.App.4th 865, 870-871.) “ ‘When, as here, the point focuses on comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.’ [Citation.]” (*People v. Thomas* (2012) 53 Cal.4th 771, 797.)

Relying on *Centeno, supra*, defendant argues the prosecutor committed misconduct by misstating the reasonable doubt standard. There, as here, the defendant was charged with molesting a young child. (*Centeno, supra*, 60 Cal.4th at p. 663.) During rebuttal, the prosecutor displayed a geographic outline of the State of California and asked the jury to imagine a hypothetical criminal trial in which the issue was “ ‘[w]hat state is this?’ ” (*Id.* at p. 664.) “She then laid out hypothetical ‘testimony’ given by witnesses that contained inconsistencies, omissions, and inaccuracies, but urged that, even had the jurors heard such evidence, they would have no reasonable doubt that the state was California.” (*Ibid.*) The prosecutor went on to argue that the jury should convict based on a “reasonable” view of the evidence. (*Id.* at p. 662.) Specifically, the prosecutor argued, “ ‘Is it reasonable to believe that a shy, scared child who can’t even name the body parts made up an embarrassing, humiliating sexual abuse, came and testified to this in a room full of strangers *or the defendant abused Jane Doe. That is what is reasonable, that he abused her.* [¶] Is it reasonable to believe that Jane Doe is lying to set-up the defendant for no reason or is the defendant guilty?’ . . . She continued: ‘Is it reasonable to believe that there is an innocent explanation for a grown man laying on a seven year old? No, that is not reasonable. Is it reasonable to believe that there is an

innocent explanation for the defendant taking his penis out of his pants when he's on top of a seven-year-old child? No, that is not reasonable. Is it reasonable to believe that the defendant is being set-up in what is really a very unsophisticated conspiracy led by an officer who has never met the defendant *or he['s] good for it? That is what is reasonable. He's good for it.'* ” (*Id.* at pp. 671-672.)

Our Supreme Court reversed the defendant's convictions, finding the prosecutor misstated the burden of proof. (*Centeno, supra*, 60 Cal.4th at pp. 673 and 675.) The court explained: “It is permissible to argue that the jury may reject impossible or unreasonable interpretations of the evidence and to so characterize a defense theory. [Citation.] It is permissible to urge that a jury may be convinced beyond a reasonable doubt even in the face of conflicting, incomplete, or partially inaccurate accounts. [Citation.] It is certainly proper to urge that the jury consider all the evidence before it. [Citations.]” (*Id.* at p. 672.)

“Here,” the court continued, “the prosecutor's argument began with what the jury could consider: reasonably possible interpretations to be drawn from the evidence. While this is an acceptable explanation of the jury's starting point, it is only the beginning. Setting aside the incredible and unreasonable, the jury evaluates the evidence it deems worthy of consideration. It determines just what that evidence establishes and how much confidence it has in that determination. The standard of proof is a measure of the jury's level of confidence. It is not sufficient that the jury simply believe that a conclusion is reasonable. It must be convinced that all necessary facts have been proven beyond a reasonable doubt. [Citation.] The prosecutor, however, left the jury with the impression that so long as her interpretation of the evidence was reasonable, the People had met their burden. The failure of the prosecutor's reasoning is manifest.” (*Centeno, supra*, 60 Cal.4th at p. 672.)

Applying *Centeno*, we agree with defendant that the prosecutor committed misconduct by arguing that, “*Beyond a reasonable doubt means it makes sense to you,*”

suggesting that the jury only needed to be convinced “within reason,” and implying that reasonable doubt entails the mere application of “*commonsense, reason, and logic*.” Here, as in *Centeno*, the prosecutor’s remarks conflated the concepts of “common sense” and “reason” with the standard of proof beyond a reasonable doubt, leaving the impression that the jury could find defendant guilty based on a mere sensible or reasonable account of the evidence. (*Centeno, supra*, 60 Cal.4th at p. 673.) These remarks clearly had the potential to dilute the prosecution’s burden. (*Ibid.*)

We look again to *Centeno* for guidance on the issue of prejudice. The *Centeno* court held that defense counsel’s failure to object to the prosecutor’s misstatements of the burden of proof was prejudicial for several reasons: The trial court instructed the jury before closing arguments, the prosecutor’s misstatements occurred in rebuttal, defense counsel did not object, and the trial court did not admonish or reinstruct the jury on reasonable doubt after the erroneous argument so that “the prosecutor’s argument was the last word on the subject.” (*Centeno, supra*, 60 Cal.4th at pp. 676-677.) Additionally, the People conceded that the matter involved “a very close case.” (*Id.* at p. 677.) “Given the closeness of the case and the lack of any corrective action,” the court concluded, “there is a reasonable probability that the prosecutor’s argument caused one or more jurors to convict defendant based on a lesser standard than proof beyond a reasonable doubt.” (*Ibid.*)

The present case shares obvious similarities with *Centeno*. There, as here, the trial court instructed the jury before closing arguments, defense counsel did not object to the prosecutor’s misstatements, and the trial court did not admonish or reinstruct the jury on reasonable doubt after the erroneous argument. (*Centeno, supra*, 60 Cal.4th at pp. 664-665.) Unlike *Centeno*, however, this was not a “close case.” In *Centeno*, the prosecution depended “almost entirely” on the testimony of a single child witness which was “called into question in several respects.” (*Id.* at p. 677.) In this case, by contrast, there was abundant evidence of defendant’s guilt. B.T. and T.C., two young women with no prior

relationship to one another, testified credibly and consistently, and their testimonies were corroborated by their prior statements to law enforcement. T.C.'s testimony was further corroborated by the independent recollections of M.C. and S.K., Boyle's SART findings, and defendant's own admissions. On this record, we find no reasonable probability that the jury would have reached a different verdict had the prosecutor not mischaracterized the standard of proof.

Turning to the prosecutor's rebuttal argument, we agree with defendant that the prosecutor misspoke when he said, "The tie does not go to the defendant." The prosecutor appears to have been attempting, inartfully, to make a fair point: CALCRIM No. 224 does not require the jury to accept unreasonable conclusions. Nevertheless, the prosecutor misstated the law when he posited the existence of a tie that does not go to the defendant. To the extent that he said anything about a tie, the prosecutor should have said that any tie would necessarily go to the defendant, but the rule does not apply when one of the conclusions drawn from circumstantial evidence is unreasonable. (CALCRIM No. 224.) In that circumstance, there is no tie. Although the prosecutor committed misconduct by mischaracterizing the burden of proof, for the reasons previously stated, we do not believe the misconduct was prejudicial. It was clear from the context of the prosecutor's argument that he was not suggesting that the conclusions to be drawn from the circumstantial evidence were in equipoise. Rather, the thrust of the prosecutor's argument was that the defense account of the circumstantial evidence was unreasonable. Indeed, the prosecutor went on to debunk the defense account of the circumstantial evidence at length. The prosecutor misstated the law again when he argued in rebuttal, "[Defense counsel] talked a lot about the presumption of innocence. That's gone. *The minute you get back into that deliberation room, that presumption is shed.* He was presumed innocent until he was proven guilty. And we have spent the last several weeks doing that. [¶] Each part of that presumption has been chipped away, *and now he is cloaked in guilt* by the evidence that has been presented, by his own words, by his own

letters, by his own writing.” We agree that the italicized statements were significant misstatements of the law. (*People v. Cowan* (2017) 8 Cal.App.5th 1152, 1159 [“The presumption of innocence continues . . . during jury deliberations until the jury reaches a verdict”]; *People v. Dowdell* (2014) 227 Cal.App.4th 1388, 1408 [“It is well established that the presumption of innocence continues into deliberations, and the presumption was in no sense ‘over’ [at the close of trial as] the prosecutor declared it to be so”].) Even so, we perceive no reasonable likelihood defendant would have obtained a more favorable result without the misconduct. Although the prosecutor misstated the law on several occasions, the misstatements would have been effectively countered by the jury instructions, which properly instructed the jury as to the standard of proof and presumption of innocence. Furthermore, unlike *Centeno*, this was not a close case. As we have discussed, the evidence was overwhelming that defendant sexually abused B.T. and T.C. over a period of years. On this record, we perceive no reasonable probability that the outcome would have been more favorable to defendant absent the prosecutor’s misstatements of law. (*People v. Peoples* (2016) 62 Cal.4th 718, 799; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) And because there was no prejudice to defendant, his ineffective assistance of counsel claim also fails. (*Strickland v. Washington* (1984) 466 U.S. 668, 697; *People v. Carrasco* (2014) 59 Cal.4th 924, 982.)

B. CALCRIM No. 1191

Next, defendant argues the trial court erred in instructing the jury with CALCRIM No. 1191. Specifically, defendant argues the instruction allowed the jury to consider B.T.’s testimony regarding uncharged, time-barred offenses to corroborate her own testimony with respect to the charged offenses against her. We conclude that defendant has forfeited any challenge to CALCRIM No. 1191. In any event, the challenge fails on the merits.

1. Background

The prosecution presented evidence that defendant committed offenses against B.T. that were uncharged by reason of the statute of limitations. Defendant did not object to the admission of the evidence of uncharged offenses against B.T.

The jury was instructed with CALCRIM No. 375 that they could consider the uncharged offenses against B.T. as set forth in CALCRIM No. 1191.¹⁰ Defense counsel did not request any clarifying or limiting instructions regarding the evidence of uncharged offenses against B.T.

2. Forfeiture

The People argue that defendant has forfeited his challenge to CALCRIM No. 1191 because the instruction was “correct in law” and “responsive to the evidence.”

¹⁰ The jury was instructed with CALCRIM No. 1191 as follows: “The People presented evidence that the defendant committed the crime of lewd and lascivious acts with a child under the age of 14 years that was not charged in this case. This crime is defined for you in these instructions.

“You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offense[s]. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.

“If the People have not met this burden of proof, you must disregard this evidence entirely.

“If you decide that the defendant committed the uncharged offense[s], you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit and did commit the charged offenses and their lesser included offenses, as charged here. If you conclude that the defendant committed the uncharged offense[s], that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of the charged offenses or their lesser included offenses. The People must still prove each charge beyond a reasonable doubt.

“Do not consider this evidence for any other purpose except for the limited purposes of intent or that described in this instruction.”

Defendant responds that the forfeiture rule does not apply because the instruction contains an incorrect statement of law that affected his substantial rights. We reject defendant's contention that CALCRIM No. 1191 contained an incorrect statement of law.

3. *Analysis*

Defendant does not suggest the evidence of uncharged offenses against B.T. was inadmissible. Nor does he contend the trial court erred in instructing the jury that evidence of uncharged offenses against B.T. could be used to support an inference that defendant had a propensity to commit the charged offenses against T.C. Instead, defendant argues the trial court erred in instructing the jury with CALCRIM No. 1191 to the extent the instruction allowed B.T. to corroborate her own testimony. We are not persuaded.

Section 1101, subdivision (a) generally renders inadmissible “evidence of a person’s character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) . . . when offered to prove his or her conduct on a specified occasion.” Enacted in 1995, section 1108 “was intended in sex offense cases to relax the evidentiary restraints section 1101, subdivision (a) imposed, to assure that the trier of fact would be made aware of the defendant’s other sex offenses in evaluating the victim’s and the defendant’s credibility.” (*People v. Falsetta* (1999) 21 Cal.4th 903, 911.) Section 1108 provides, in pertinent part: “In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant’s commission of another sexual offense or offenses is not made inadmissible by section 1101, if the evidence is not inadmissible pursuant to Section 352.” (§ 1108, subd. (a); see *People v. Cottone* (2013) 57 Cal.4th 269, 285.)

CALCRIM No. 1191 was, until recently, the pattern jury instruction explaining section 1108. (CALCRIM No. 1191; see also *People v. Villatoro* (2012) 54 Cal.4th 1152, 1160 (*Villatoro*).) With respect to the admission of uncharged sex offenses, the Supreme Court has held that “CALJIC No. 2.50.01, the predecessor to CALCRIM No.

1191, is a correct statement of law.” (*Villatoro, supra*, at p. 1160; see also *People v. Crompt* (2007) 153 Cal.App.4th 476, 480 [finding “no material difference” between CALJIC No. 2.50.01 and CALCRIM No. 1191].)

Relying on *People v. Smittcamp* (1945) 70 Cal.App.2d 741 (*Smittcamp*), *People v. Stanley* (1967) 67 Cal.2d 812 (*Stanley*) and *People v. Ewoldt* (1994) 7 Cal.4th 380 (*Ewoldt*), defendant argues that CALCRIM No. 1191 should not be given where, as here, the evidence of uncharged sexual misconduct comes from the victim-witness, rather than a third party. Although *Smittcamp*, *Stanley* and *Ewoldt* express concerns about the admissibility of propensity evidence by victim-witnesses (*Smittcamp, supra*, at p. 747; *Stanley, supra*, at p. 817, *Ewoldt, supra*, at pp. 407-408), these authorities predate the enactment of section 1108, which “ ‘ “radically changed” the general rule prohibiting propensity evidence in “sex crime prosecutions.” ’ ” (*People v. Ranlett* (2016) 1 Cal.App.5th 363, 374.) Not surprisingly, given their age, defendant’s cases do not address the admissibility of uncharged sex offenses against a single victim-witness under section 1108, or the use of CALCRIM No. 1191 in cases involving such evidence. However, another case, of more recent vintage, addresses this very issue.

In *Gonzales, supra*, 16 Cal.App.5th 494 the prosecution introduced evidence of uncharged sex offenses that the defendant committed against the same victim through the victim’s own testimony, rather than the testimony of a third party. (*Id.* at p. 496.) The defendant objected to the admission of the uncharged offenses as more prejudicial than probative under section 352. (*Id.* at p. 500.) The trial court overruled the objection and instructed the jury with CALCRIM No. 1191. (*Id.* at p. 500.) On appeal, the defendant, relying on *Stanley*, argued that “instructing the jury with CALCRIM No. 1191 on uncharged acts improperly allowed [the victim] to corroborate her own testimony.” (*Ibid.*) A divided panel of Division Six of the Second Appellate District rejected the defendant’s argument, distinguishing *Stanley* and holding that, “Nothing in section 1108 limits its effect to the testimony of third parties. Instead, the statute allows the admission

of evidence of uncharged sexual offenses from any witness subject to section 352.” (*Id.* at p. 502, citing *People v. Ennis* (2010) 190 Cal.App.4th 721, 733 [upholding trial court’s ruling under section 352 that evidence of uncharged crimes from same witness who testified to charged crimes is admissible].) The *Gonzales* majority found that the trial court complied with section 1108. (*Gonzales, supra*, at p. 502.) Accordingly, the *Gonzales* majority concluded, CALCRIM No. 1191 was properly given. (*Gonzales, supra*, at p. 502.)

We are inclined to agree with the *Gonzales* majority that section 1108 does not limit propensity evidence to evidence provided by third parties. (*Gonzales, supra*, 16 Cal.App.5th at p. 502; see also *Villatoro, supra*, 54 Cal.4th at p. 1161 [holding that the definition of another sexual offense or offenses in section 1108 “contains no limitation, *temporal or otherwise*, to suggest that [it] covers only offenses other than those for which defendant is currently on trial” (italics added)].) We are also inclined to agree that neither *Stanley* nor any of defendant’s other authorities are dispositive. We need not reach these issues, however, as B.T. was a third party, so far as T.C. was concerned. There is no question that B.T.’s propensity evidence could be used to corroborate T.C.’s testimony. It follows that the evidence was admissible for the purpose stated in CALCRIM No. 1191. “Given that the evidence is admissible for such purpose, CALCRIM No. 1191 correctly instructs the jury.” (*Gonzales, supra*, at p. 501.)

Defendant argues that CALCRIM No. 1191 allowed the jury to draw an irrational inference because B.T.’s propensity evidence would not assist the jury in assessing B.T.’s credibility with respect to the charged offenses. The *Gonzales* majority considered—and rejected—the same argument, stating: “[T]here is nothing irrational about a victim supporting her testimony with testimony of uncharged sexual offenses.” (*Gonzales, supra*, 16 Cal.App.5th at p. 502.) The *Gonzales* majority agreed with the defendant that “such testimony is not as probative as similar testimony from a third party.” (*Ibid.*) Nevertheless, the *Gonzales* majority concluded, “it is still probative.” (*Ibid.*; cf. *Ewoldt*,

supra, 7 Cal.4th at p. 407 [recognizing, in the context of § 1101, that testimony by a complaining witness may have less probative value than testimony by a third party, but recognizing also that there may be circumstances in which it is admissible under § 352].) Accordingly, the *Gonzales* majority concluded, “CALCRIM No. 1191 does not violate due process.” (*Gonzales, supra*, at p. 502.) We agree with the *Gonzales* majority’s reasoning and likewise conclude that the inference permitted by CALCRIM No. 1191 was not irrational.

C. Billie Jo

Next, defendant advances two related arguments arising from the incident involving Billie Jo, his now deceased daughter. First, defendant argues the trial court should not have instructed the jury with CALCRIM No. 375 on the issue of intent. Second, defendant argues the trial court should not have admitted the evidence pursuant to section 1108 or instructed the jury with CALCRIM No. 1191. We assume without deciding that the trial court erred in giving CALCRIM No. 375, and accept the People’s concession that the trial court erred in failing to make a preliminary determination whether the Billie Jo incident amounted to a crime. Even so, the errors were harmless.

1. Background

On the day the jury was sworn, defendant filed an unopposed motion in limine to exclude evidence of the breast-grabbing incident involving Billie Jo. During the prosecution’s case-in-chief, defense counsel inexplicably opened the door to the Billie Jo allegations, despite a warning by the trial court that he was running the risk of doing so.

Later, in an apparent attempt to unring the bell, defendant testified on direct examination that he inadvertently grabbed and squeezed Billie Jo’s breast during

horseplay. Defendant admitted on cross-examination that, in describing the incident to an investigating officer, he said that he “got a handful of tit.”¹¹

The prosecution asked the trial court to modify CALCRIM Nos. 375 and 1191 to include the incident involving Billie Jo. Defense counsel objected. Following a conference on proposed jury instructions, the trial court agreed to instruct the jury with CALCRIM No. 375 that the Billie Jo incident was relevant for the limited purpose of determining defendant’s intent. The trial court also agreed to instruct the jury with CALCRIM No. 1191 that they could, but were not required to, consider the Billie Jo incident for propensity purposes. The trial court rejected defense counsel’s argument that the court was required to determine by a preponderance of the evidence the preliminary fact that defendant acted with lewd intent such that a crime occurred. In the trial court’s view, the court was only required to make a “prima facie determination” that the defendant’s testimony established the existence of a crime. According to the trial court, it was up to the jury to decide whether a crime occurred by a preponderance of the evidence, which they could then consider in deciding whether defendant committed the charged offenses. The trial court also rejected defense counsel’s argument that the prosecutor should not be allowed to argue the Billie Jo incident. During closing argument, the prosecutor referred to the Billie Jo incident several times, urging the jury to reject defendant’s explanation for the incident, and characterizing it as an example of “lightening striking three times.”

¹¹ As far as defendant could recall, Billie Jo alleged that he touched her inappropriately on one or two other occasions. The parties agree that the breast-grabbing incident is the only relevant incident on appeal.

2. *Analysis*

Defendant argues that the trial court should not have instructed the jury with CALCRIM No. 375 on the issue of intent. Specifically, defendant argues the Billie Jo incident was not relevant or admissible on the issue of intent because the only evidence of the incident came from defendant himself, and he specifically denied having touched Billie Jo with lewd intent. The People respond that the jury could have inferred defendant's lewd intent from the circumstances surrounding the Billie Jo incident, as described by defendant.

“Evidence of intent is admissible to prove that, if the defendant committed the act alleged, he or she did so with the intent that comprises an element of the charged offense. ‘In proving intent, the act is conceded or assumed; what is sought is the state of mind that accompanied it.’ [Citation.]” (*Ewoldt, supra*, 7 Cal.4th at p. 394, fn. 2, italics omitted.) Here, the acts alleged were not conceded or assumed; they were contested. Although defendant's not-guilty plea placed all of the elements of the crime at issue, including intent (*People v. Brandon* (1995) 32 Cal.App.4th 1033, 1049, fn. 12), there was no question as to whether or not the acts described by B.T. and T.C. were committed with lewd intent. The issue was whether the acts occurred at all. Under the circumstances, we are inclined to agree with defendant that the Billie Jo incident was not relevant to the issue of intent (since intent was not a contested issue), and CALCRIM No. 375 should not have been given. We need not decide this issue, however, because any error in giving CALCRIM No. 375 was harmless.

CALCRIM No. 375 instructed the jury that they could consider the Billie Jo incident for the limited purpose of deciding whether defendant “acted with the intent to sexually arouse and or sexually gratify himself in this case.” (CALCRIM No. 375.) As we have suggested, defendant's intent was not at issue, as there was no innocent explanation for the acts described by B.T. and T.C. If the jury believed defendant committed the acts, they necessarily believed he acted with lewd intent. A reasonable

jury, having been specifically instructed that they were not to consider the Billie Jo incident for any other purpose (except as discussed below), and having been further instructed that “[s]ome of these instructions may not apply,” would likely view CALCRIM No. 375 as superfluous. We perceive no reasonable probability that defendant would have obtained a better result had CALCRIM No. 375 not been given.

Defendant’s argument that the trial court erred in admitting the Billie Jo incident under section 1108 and instructing the jury with CALCRIM No. 1191 fails for similar reasons. Defendant argues the trial court should have determined whether his testimony regarding the Billie Jo incident established the existence of a crime by a preponderance of the evidence under section 405. The People concede the issue, and we accept the concession. (§ 405 [addressing the trial court’s duty to evaluate preliminary facts related to evidentiary rules of exclusion]; *People v. Cottone, supra*, 57 Cal.4th at pp. 285-286 [trial court has preliminary duty to evaluate whether § 1108 evidence amounts to a crime under § 405].) Even accepting the People’s concession, the error was harmless.

We assume for the sake of argument that the trial court, had it made a preliminary determination of fact under section 405, would not have been persuaded that the Billie Jo incident amounted to criminal conduct, and would not have allowed the incident to be used as propensity evidence. Even so assuming, we see no reasonable probability that defendant would have obtained a more favorable outcome. We reiterate that defendant opened the door to the Billie Jo incident and, for whatever reason, chose to elaborate on the incident on direct examination. Even in a world in which the trial court refused to treat the Billie Jo incident as propensity evidence under section 1108 and refused to instruct the jury with CALCRIM No. 1191, the evidence would still be before the jury in the form of defendant’s own testimony. Although the evidence was undoubtedly quite damaging, the harm came, not from the fact that the Billie Jo incident was allowed to be used as propensity evidence, but from the fact that the evidence was introduced at all. On the record before us, we are convinced that any potential harm flowing from the trial

court's error was eclipsed by the actual harm flowing from defendant's ill-considered decision to introduce the Billie Jo incident himself. Under the unique circumstances of this case, we conclude that any prejudice to defendant was entirely self-inflicted.

Defendant attempts to avoid this conclusion by arguing that the trial court's use of CALCRIM No. 1191 violated due process by creating an irrational inference. Given the nature and strength of the properly admitted evidence of uncharged offenses against B.T., which was decidedly more extreme and inflammatory than the evidence of a possible crime involving Billie Jo, we perceive no reasonable possibility that the jury would have based a propensity inference on the Billie Jo incident. Since the jury could appropriately infer defendant's propensity to molest young girls from other, properly admitted evidence, we conclude that any errors arising from the trial court's handling of the Billie Jo incident were harmless. If anything, by giving the jury an acceptable, if somewhat ill-fitting framework with which to evaluate the Billie Jo incident, the trial court's decision to instruct the jury with CALCRIM No. 1191 protected defendant against further self-inflicted harm. On the record before us, any errors arising from the giving of the instruction were harmless under any standard.

D. CALCRIM Nos. 332 and 360

Next, defendant argues that the jury instructions regarding expert witness testimony (CALCRIM No. 332) and statements to an expert (CALCRIM No. 360) were conflicting, confusing, and undermined the effectiveness of Dr. Atwal's testimony. Specifically, defendant argues the instructions were conflicting in that CALCRIM No. 332 instructed jurors that they must decide if the information relied upon by Dr. Atwal was true and accurate, while CALCRIM No. 360 told jurors they were not to consider defendant's statements to Dr. Atwal as proof that the information contained in the statements was true. (CALCRIM Nos. 332 and 360.) On the record before us, the instructions do not conflict.

1. Background

Dr. Atwal, a forensic psychologist, evaluated defendant for the defense in 2009. As part of her evaluation, Dr. Atwal reviewed relevant documents, administered psychological tests, and interviewed defendant. During the interviews, defendant recounted significant milestones in his personal history, including his previous marriage and divorce, his relationship with M.C., and his relationships with Billie Jo and S.K. Defendant also disclosed that he had been accused of having sexually molested Billie Jo, B.T. and T.C. Defendant denied the allegations. Based on her interviews, testing, and review of available records, Dr. Atwal formed the opinion that defendant does not have the characteristics of a child molester.

The jury received two instructions regarding the evaluation of Dr. Atwal's testimony. First, the jury was instructed with CALCRIM No. 332, in pertinent part, as follows:

“Witnesses were allowed to testify as experts and to give opinions. You must consider the opinions, but you are not required to accept them as true or correct. The meaning and importance of any opinion are for you to decide. In evaluating the believability of an expert witness, follow the instructions about the believability of witnesses generally. In addition, consider the expert's knowledge, skill, experience, training, and education, the reasons the expert gave for any opinion, and the facts or information on which the expert relied in reaching that opinion. *You must decide whether information on which the experts relied was true and accurate.* You may disregard any opinion that you find unbelievable, unreasonable, or unsupported by the evidence.” (See CALCRIM No. 332, italics added.)

Second, the jury was instructed with CALCRIM No. 360 as follows:

“Dr. Atwal testified that in reaching her conclusions as an expert witness, she considered statements made by the defendant. You may consider those statements only to evaluate the expert's opinion. *Do not consider those statements as proof that the*

information contained in the statements is true.” (See CALCRIM No. 360, italics added.)

Defendant did not object to either instruction.

2. *Analysis*

Defendant argues that CALCRIM Nos. 332 and 360 were contradictory because the jury was first charged with determining whether the information on which Dr. Atwal relied was true and accurate, and then told that they were not to consider defendant’s statements to Dr. Atwal, on which she indisputably relied, as proof that the information contained in the statements was true. Although defense counsel failed to object to the instructions, the omission was understandable, given the state of the law at the time of trial. At the time, CALCRIM No. 360 accurately reflected the law regarding out-of-court statements to experts. (See generally *People v. Gardeley* (1996) 14 Cal.4th 605, 618-619, overruled in part in *People v. Sanchez* (2016) 63 Cal.4th 665, 686 (*Sanchez*).) Our Supreme Court addressed the relationship between CALCRIM No. 332 and CALCRIM No. 360 in *Sanchez*, a case decided after the trial in this matter and described as a “paradigm shift” in the law. (*People v. Stamps* (2016) 3 Cal.App.5th 988, 995.) “Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence.” (*People v. Welch* (1993) 5 Cal.4th 228, 237-238.) Giving defendant the benefit of the doubt, we decline to treat the issue as forfeited.

In *Sanchez*, our Supreme Court disapproved of case-specific hearsay to support a gang expert’s opinion that was based on conversations with other officers and gang members. (*Sanchez, supra*, 63 Cal.4th at pp. 670-673.)

With respect to CALCRIM Nos. 332 and 360, the court explained: “When an expert is not testifying in the form of a proper hypothetical question and no other evidence of the case-specific facts presented has or will be admitted, there is no denying that such facts are being considered by the expert, and offered to the jury, as true.

Indeed, the jury here was given a standard instruction that it ‘must decide whether information on which the expert relied was true and accurate.’ (CALCRIM No. 332 [Expert Witness Testimony].) Without independent competent proof of those case-specific facts, the jury simply had no basis from which to draw such a conclusion. The court also confusingly instructed the jury that the gang expert’s testimony concerning ‘the statements by the defendant, police reports, [field identification] cards, STEP [Street Terrorism Enforcement and Prevention Act] notices, and speaking to other officers or gang members’ should not be considered ‘proof that the information contained in those statements was true.’ Jurors cannot logically follow these conflicting instructions. They cannot decide whether the information relied on by the expert ‘was true and accurate’ without considering whether the specific evidence identified by the instruction, and upon which the expert based his opinion, was also true. ‘To admit basis testimony for the nonhearsay purpose of jury evaluation of the experts is . . . to ignore the reality that jury evaluation of the expert requires a direct assessment of the truth of the expert’s basis.’ [Citations.]” (*Sanchez, supra*, 63 Cal.4th at p. 684.)

The present case is markedly different from *Sanchez*. In *Sanchez*, case-specific hearsay statements from multiple sources were offered for the truth of the matter by a prosecution expert with no independent proof, in violation of the Sixth Amendment. (*Sanchez, supra*, 63 Cal.4th at p. 684.) In this case, by contrast, out-of-court statements by defendant were offered for the truth of the matter by a defense expert, following defendant’s direct testimony as to the same information. Unlike the “basis” evidence in *Sanchez*, the case-specific hearsay on which Dr. Atwal relied was virtually identical to defendant’s direct testimony, which the jury could independently evaluate.¹² Because the

¹² Dr. Atwal testified that defendant told her about his medical history (including his prostrate issues, high blood pressure, and erectile dysfunction), his life history (including his marriage to S.K. and Billie Jo’s mother, his marriage to M.C., and Billie Jo’s

jury was presented with independent competent proof of the case-specific facts on which the defense expert relied, they could logically follow *both* CALCRIM No. 332, which directed them to determine whether the information on which Dr. Atwal relied was true and accurate, *and* CALCRIM No. 360, which advised them that defendant's out-of-court statements to Dr. Atwal were not admitted for their truth. In the unique circumstances of this case, where defendant directly testified to the same information on which Dr. Atwal relied in forming her opinion, CALCRIM No. 332 and CALCRIM No. 360 were neither contradictory nor logically impossible to follow. On the record before us, we perceive no reasonable possibility that the jury could have been confused or misled by CALCRIM No. 332 and CALCRIM No. 360. Any error in giving the instructions was harmless by any standard.

E. CALCRIM No. 302

Next, defendant argues the trial court erred in instructing the jury on evaluating conflicting evidence. We are not persuaded.

The trial court instructed the jury with CALCRIM No. 302 as follows: "If you determine there is a conflict in the evidence, you must decide what evidence, if any, to believe. Do not simply count the number of witnesses who agree or disagree on a point and accept the testimony of the greater number of witnesses. On the other hand, do not disregard the testimony of any witness without a reason or because of prejudice or a desire to favor one side or the other. What is important is whether the testimony or any other evidence convinces you, not just the number of witnesses who testify about a certain point."

Defendant argues that the instruction is correct with respect to inculpatory evidence, but incorrect with respect to exculpatory evidence. He observes that

allegations), and the allegations against him. Defendant testified to the same subject matters on direct examination.

inculpatory evidence must be found convincing beyond a reasonable doubt, while exculpatory evidence need not be found convincing or believable; it need only raise a reasonable doubt as to guilt. He argues it was error to instruct the jury to evaluate exculpatory and inculpatory according to the same standard, and claims the instruction diluted the prosecution's burden of proof by suggesting that the jury may believe defendant's witnesses only if it finds their testimony believable and convincing, rather than capable of raising a doubt.

Defendant has forfeited this argument by failing to object or request a modification in the trial court. A defendant who believes an instruction is incomplete or requires clarification is obligated to request an additional or clarifying instruction. (*People v. Rojas* (2015) 237 Cal.App.4th 1298, 1304.) Failure to request such clarification forfeits the claim on appeal. (*Ibid.*)

In any event, the argument lacks merit. CALCRIM No. 302 says nothing at all about reasonable doubt. By contrast, other instructions were given that reiterated the prosecution's burden of proving guilt beyond a reasonable doubt (i.e., CALCRIM No. 220 ["A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt"]). CALCRIM No. 302 "does *not* tell the jury to disregard the prosecution's burden of proof or to decide the case on the basis of disbelief of defense witnesses or presentation of more compelling evidence by the prosecution than by the defense." (*People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1191.)

Furthermore, the instruction leaves it to the jury to "decide what evidence, if any, to believe." (CALCRIM No. 302.) Logically, this means the jury may conclude there is a reasonable doubt as to guilt even if it does not believe defendant's exculpatory evidence. The instruction does not say that the jury must believe defendant's exculpatory evidence before it may conclude there is a reasonable doubt as to his guilt. The jury was correctly instructed.

F. B.T.'s Unrelated Sexual Conduct

Next, defendant argues the trial court erred in denying his motion to introduce evidence of B.T.'s prior sexual conduct to show she had a preexisting knowledge of sexual matters at the time she made her allegations against defendant. We are not persuaded.

1. Background

Prior to trial, defendant made a motion pursuant to section 782 to admit evidence that B.T. engaged in sexual intercourse at the age of 12 with a boy her own age, two weeks before she disclosed defendant's abuse to Davitto in 1998. Specifically, B.T. told the forensic interview specialist that her boyfriend put his penis inside her "privates," by which she meant her vagina.

Relying on *People v. Daggett* (1990) 225 Cal.App.3d 751 (*Daggett*), defense counsel argued the encounter gave B.T. sexual knowledge that she would not otherwise have as a 12 year old, which she could have used to fabricate allegations against defendant. Following a hearing, the trial court denied the motion, stating: "One thing that . . . separates this case—or two things that make this distinct from the situation in *Daggett* is we are dealing with a 12[]year[]old. Let's say that she's a developmentally delayed 12[]year[]old. Nonetheless, we have a 12[]year[]old, who was exposed to many things, including, I suspect, by that time even a health class and discussions with friends and things of that nature, and has reached a level and degree of maturity where she would know at least the acts that you have described. Frankly, the acts that you have described that she's attributing to your client are, based on my experience, to be rather generic."

2. Analysis

Generally, a defendant may not question a witness who claims to be the victim of sexual assault about his or her prior sexual activity. (§ 1103, subd. (c)(1); *People v. Mestas* (2013) 217 Cal.App.4th 1509, 1513 (*Mestas*).) Section 782, however, provides

an exception to this general rule. (See generally *People v. Bautista* (2008) 163 Cal.App.4th 762, 781-782; *People v. Chandler* (1997) 56 Cal.App.4th 703, 707-708; *Daggett, supra*, 225 Cal.App.3d at p. 757.)

Section 782 “requires a defendant seeking to introduce evidence of the witness’s prior sexual conduct to file a written motion accompanied by an affidavit containing an offer of proof concerning the relevance of the proffered evidence to attack the credibility of the victim. [Citations.] The trial court is vested with broad discretion to weigh a defendant’s proffered evidence, prior to its submission to the jury, ‘and to resolve the conflicting interests of the complaining witness and the defendant.’ [Citation.] ‘[T]he trial court need not even hold a hearing unless it first determines that the defendant’s sworn offer of proof is sufficient.’ [Citations.]” (*Mestas, supra*, 217 Cal.App.4th at p. 1514.) “If the offer of proof is sufficient, the court must conduct a hearing outside the presence of the jury and allow defense counsel to question the complaining witness regarding the offer of proof. [Citations.] ‘The defense may offer evidence of the victim’s sexual conduct to attack the victim’s credibility if the trial judge concludes following the hearing that the prejudicial and other effects enumerated in . . . section 352 are substantially outweighed by the probative value of the impeaching evidence.’ [Citations.]” (*Ibid.*)

We review a trial court’s ruling on the admissibility of evidence under section 782 under an abuse of discretion standard. (*People v. Rowland* (1992) 4 Cal.4th 238, 264.) The trial court’s ruling will be upheld unless there is a clear showing of an abuse of discretion. (*People v. Harris* (2005) 37 Cal.4th 310, 337; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 75.)

Defendant argues the trial court abused its discretion in several respects. First, he argues the trial court “labored under the misconception that . . . section 1103 was applicable,” and operated as “an impediment” to the admission of the proffered evidence. We disagree. Although the trial court referenced section 1103 in denying the motion,

nothing in the record suggests that the court misunderstood or misapplied the applicable statutory scheme. To the contrary, the record confirms that the trial court understood the relationship between sections 1103 and 782 and reasonably concluded that defendant's offer of proof did not justify an exception to the public policy, reflected in section 1103, of limiting public exposure of the complaining witness's other sexual conduct. (*People v. Chandler, supra*, 56 Cal.App.4th at pp. 707-708.) That the trial court was not convinced by defendant's offer of proof does not mean the court misapprehended the applicable statutory scheme.

Second, defendant argues the trial court misunderstood *Daggett*, in which the court explained: "A child's testimony in a molestation case involving oral copulation and sodomy can be given an aura of veracity by his accurate description of the acts. This is because knowledge of such acts may be unexpected in a child who had not been subjected to them. [¶] In such a case it is relevant for the defendant to show that the complaining witness had been subjected to similar acts by others in order to cast doubt upon the conclusion that the child must have learned of these acts through the defendant. Thus, if the acts involved in the prior molestation are similar to the acts of which the defendant stands accused, evidence of the prior molestation is relevant to the credibility of the complaining witness and should be admitted." (*Daggett, supra*, 225 Cal.App.3d at p. 757.)

During the hearing, the prosecutor distinguished *Daggett* on the grounds that Daryl, the complaining witness in that case, was five at the time of the alleged molestation. By comparison, the prosecutor observed, B.T. was 12 at the time of disclosure. The trial court appears to have accepted the prosecutor's apples to oranges comparison, telling defense counsel, "I think the argument that you are making has much more persuasive force if we are talking about somebody who was 4 or 5 like the *Daggett* case. Clearly, what we are talking about is an inference or expectation on the part of the jury in terms of what someone should know."

Defendant correctly argues that the trial court should have considered Daryl's age at the time of disclosure, which appears to have been 12, not five. (*Daggett, supra*, 225 Cal.App.3d at p. 754.) Had the trial court done so, defendant insists, the court would have found *Daggett* indistinguishable on the facts and would have granted the motion to admit the proffered evidence of B.T.'s sexual activity with a 12-year-old boy. We are not convinced.

Although the trial court appears to have overlooked the similarity in ages between Daryl and B.T., the court's analysis was not based on B.T.'s age alone. In deciding whether to exclude evidence of B.T.'s encounter with another 12 year old, the trial court also considered the nature of the acts attributed to defendant. The trial court reasonably concluded that excluding the encounter with the other child would not give B.T.'s testimony a false aura of veracity, as the acts attributed to defendant were sufficiently "generic" that a jury would be unlikely to infer that B.T. necessarily acquired her sexual knowledge from him. Although B.T. may well have been more sexually experienced than many or even most 12 year olds, we cannot say that her knowledge of sexual acts would have been so "unexpected" that a jury would be likely to infer that she learned of the acts from him. The trial court did not abuse its discretion in concluding that defendant's offer of proof was insufficient under section 782, and no hearing was required under *Daggett*.

Third, defendant argues that the trial court abused its discretion by conducting a section 352 analysis prior to conducting a section 782 hearing. We perceive no abuse of discretion. Under the statutory scheme, the trial judge "first [accepts] the offer of proof as true. He then determines whether, if the evidence is as the defendant claims, it is relevant and if relevant whether its probative value is outweighed by the probability of undue prejudice or the undue consumption of trial time. ([] § 352.) Only if the judge determines both questions in favor admissibility is the offer of proof 'sufficient.' Only if it is 'sufficient' is the trial court required to conduct the hearing to determine if the offer

truly recites what the evidence will be.” (*People v. Blackburn* (1976) 56 Cal.App.3d 685, 691-692.) Thus, section 782 contemplates that the trial court will make an initial relevance determination under section 352 in order to gauge whether defendant’s offer of proof is sufficient. (*Blackburn, supra*, at pp. 691-692.) The trial court did not abuse its discretion in evaluating defendant’s offer of proof for relevance under sections 352 and 782. (Cf. *Mestas, supra*, 217 Cal.App.4th at p. 1518 [the trial court did not abuse its discretion by refusing to hold hearing under § 782 where proffered evidence would have been excluded under § 352].)

Finally, defendant argues the exclusion of evidence of B.T.’s sexual conduct violated his constitutional right to confrontation. “A trial court’s limitation on cross-examination pertaining to the credibility of a witness does not violate the confrontation clause unless a reasonable jury might have received a significantly different impression of the witness’s credibility had the excluded cross-examination been permitted.” (*People v. Quartermain* (1997) 16 Cal.4th 600, 623- 624.) Here, defendant was allowed to impeach B.T. with evidence of past criminal conduct (namely, selling drugs), evidence that she committed sexual offenses against two young boys, and evidence that she behaved in a sexually inappropriate manner towards A.G. Defendant was also allowed to argue that B.T. was “a thief and a liar.” The jury would not have received a significantly different impression of B.T.’s credibility had defendant been allowed to introduce evidence that B.T. engaged in sexual activity with another child. The trial court’s ruling did not violate defendant’s constitutional right to confront witnesses.

G. Cumulative Error

Finally, defendant contends that the cumulative effect of the asserted errors rendered his trial fundamentally unfair and requires reversal. Although we have identified several errors that occurred during defendant’s trial, “[e]ach . . . was harmless in itself, and on this record the whole of them did not outweigh the sum of their parts.” (*People v. Roberts* (1992) 2 Cal.4th 271, 326.) Defendant was “entitled to a fair trial but

not a perfect one.” (*People v. Cunningham, supra*, 25 Cal.4th at p. 1009.) We are satisfied that defendant received due process and a fair trial.

III. DISPOSITION

The judgment is affirmed.

/S/

RENNER, J.

We concur:

/S/

BLEASE, Acting P. J.

/S/

ROBIE, J.